International Crimes Prosecution Case Selection: The ICC, ICTR, and SCSL

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Thesis submitted in partial fulfillment of the requirements for the degree of DPhil in Politics in the Department of Politics and International Relations at the University of Oxford.

Michaelmas 2013
99,542 words

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List of Acronyms

ACPHR	African Court of Human and People's Rights
AFRC	Armed Forces Revolutionary Council
AMICC	American NGOs Coalition for the International Criminal Court
APC	All People's Congress
AU	African Union
ASPA	American Service members' Protection Act
ASP	Assembly of States Parties
BBC	British Broadcasting Corporation
CAR	Central African Republic
CDF	Civil Defence Forces
CDR	Coalition for the Defence of the Republic
CIA	Central Intelligence Agency
CNN	Cable News Network
CRS	Coordinator for Reconstruction and Stabilization
DDR	Disarmament Demobilization and Reintegration
DOD	Department of Defense
DPP	Director of Public Prosecutions
DRC	The Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EO	Executive Outcomes
FAR	Rwandan Armed Forces
FICHL	Forum for International Criminal and Humanitarian Law
FPLC	Forces Patriotiques pour la Liberation du Congo
GRULAC	Latin American and Caribbean Group of States
HRW	Human Rights Watch
ICA	International Coffee Agreement
ICC	International Criminal Court
ICD	International Crimes Division
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal Yugoslavia
IDPs	Internally Displaced Persons
ILC	International Law Commission
IMF	International Monetary Fund
IMT	International Military Tribunal
JCCD	Jurisdiction, Complementary and Cooperation Division
JCE	Joint Criminal Enterprise
JLOS	Justice Law and Order Sector
JPL	Justice and Peace Law
LFP	Legal Framework for Peace
LRA	Lord's Resistance Army
LURD	Liberians United for Reconciliation and Democracy

MI6	British Intelligence Agency
NATO	The North Atlantic Treaty Alliance
NGO	Non-Governmental Organization
NPFL	National Patriotic Front of Liberia
NPRC	National Provisional Ruling Council
NRA	National Resistance Army
OAU	Organization of African Union
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RANU	Rwandan Alliance of National Unity
RPF	Rwandan Patriotic Front
RTLM	Radio Television Libre des Mille Collines
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SIERMCO	Sierra Leone Ore and Metal Company
SLA	Sierra Leone Army
SLPP	Sierra Leone People's Party
SOFAs	United States Status of Forces Agreements
SPLA	Sudan People's Liberation Army
STL	Special Tribunal for Lebanon
S/CRS	Office for the Coordinator for Reconstruction and Stabilization
SL-TRC	Sierra Leone Truth and Reconciliation Commission
UACIS	Undersecretary for Arms Control and International Security
UK	United Kingdoms
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge Trials
UNAMIR	United Nations Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNOIOS	United Nations Office of Internal Oversight Services
UPC	Union des Patriotes Congolais
UPDF	Ugandan People's Defence Forces
US	United States
USAID	United States Agency for International Development
WFP	World Food Program
WVS	Witnesses and Victim Section
WWII	World War II

<u>Abstract</u>

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Chris Mahony

International crimes prosecutions have become more common since 1993, both domestically and at international courts and tribunals. The advance of this norm confronts realist state interests causing debate about the norm's status. Kathryn Sikkink views a norm as cascading when enough states adopt it to cause international influence, without domestic pressure, to procure levels of conformity. This thesis considers the degree of conformity by observing the level of case selection independence to determine whether this norm is cascading.

By identifying the jurisdictional and functional elements of case selection independence, I develop a framework for observing the interface between politics and law. While Sikkink errs towards the quantity of international crimes prosecutions, I focus on the quality. This project examines case selection independence at the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court, in Uganda. The project considers whether case selection has become more or less independent at these courts – whether the norm of international crimes prosecution has cascaded or contracted. In observing the various case selection independence elements I attempt to explain the observed cascades and contractions at each court. I then consider whether a cascade or contraction occurred during the period of the courts' collective design and function.

The research qualitatively observes a cumulative justice contraction. The research observes a combination of factors affecting case selection independence, including shifts in power dynamics between and among weak and powerful states, increasing state sophistication in international court engagement, a shift in jurisdiction triggering actors and forums, and realist state co-option of norm entrepreneurs via endearing explanation of independence-diminishing policies.

Acknowledgements

I firstly thank Oxford's academic community, particularly the Department of Politics and International Relations. I thank Dr. Nicholas Cheeseman, Dr. Christine Cheng, Professor Jennifer Welsh, and Dr. Phillip Roessler for their valuable input at different stages of this project. I thank Keble College for its enabling social and academic environment.

I thank my colleagues at the African Studies Centre and at Oxford Transitional Justice Research, particularly Phil Clark and Lydiah Bosire who provided valuable intellectual and moral support for this project. I thank the following people for encouraging and facilitating a year in Sierra Leone and Liberia when 21 years old: Diane and Dennis Mahony, Abdul Kpakra-Massally, the Massally family, Olayinka Creighton-Randall, Meli Wainabuli, Orlando Ocasio, Brennan Gilmore, Howard Varney, Comfort Ero, Tom Perriello, Koffi Woods, Mark Henaghan, David Mahony, David Shearer, Peter Quirke, and Gary Walker. That experience constituted the infancy of my passion for this topic. At the New Zealand Centre for Human Rights Law, Policy and Practice, I thank Kris Gledhill, Stephanie Burgenmeier, Lee Lon Wong, Richard Potter, Maanya Tandon, Benjamin Mugisho, Meghan Bolwell and Hannah Clark. I thank the authors of the literature I cite throughout this thesis. I thank the interviewees who provided invaluable material to support many of my assertions, in many cases at risk to the their personal or professional security. For research or scholarship funding, I thank Oxford University's African Studies Centre, Keble College and Wolfson College, The Special Court for Sierra Leone (Saleem Vahidy), The Institute for Security Studies (Anton du Plessis), The International Center for Transitional

Justice, Auckland University Faculty of Law, and Oxford University Rugby Football Club. In Oxford, I am particularly grateful to the warm hospitality provided by friends and colleagues, particularly Luke Fenwick, Mark McBeath, Jacob McKnight, Tim Stevens and others that have kindly hosted me during the transient years. I am grateful to Jack and Paola Chaffin for their ever-generous hospitality in Atlanta. I have benefitted from revisions and comments on parts of this thesis from friends and colleagues, particularly, Alexandra Chaffin, Luke Fenwick, Jacob McKnight, Naseem Badiey, and Khylee Quince. I am also grateful for the helpful comments from my examiners, Professor William Schabas and Dr. Jonny Steinburg. I am grateful to Professor Morten Bergsmo for his encouragement and collaboration on many research projects undertaken simultaneous to this project. I am most grateful to my supervisor, Professor David Anderson, who believed in this project, as well as so many others that delayed the project's completion. His father-like guidance and support was critical, at critical times.

I have been enormously fortunate to have many educational opportunities. My parents provided me support, an education, and a perspective afforded to so few others. When I was eleven I was sent to a month-long camp in The Phillippines to meet other eleven-year olds from all over the world. When I was fourteen, my mother took my brother and I on an educational tour of historical sites in North America and Europe. These, among many other unique experiences, enabled a global insight provided to so few during their intermediate and high school years. Finally, this project would not have been possible were it not for the love, support and advice of Alexandra Chaffin, who I have been fortunate to have in my life throughout the vast majority of this project.

Chapter 1

Introduction: Case Selection 'Independence' as a norm 'cascade' indicator for International Crimes prosecution

1.1 Using case selection independence to measure the cascade of international crimes prosecution

Over the past two decades international institutions have increasingly been established to prosecute international crimes, including war crimes, crimes against humanity, genocide, and other serious violations of international humanitarian law.[1] International crimes case selection has become a particularly contentious issue, with international and domestic organizations and individual states taking positions over the legitimacy and conduct of such prosecutions. However, efforts to ensure impartiality and independence in the selection of cases prosecuted have largely failed. Independent case selection has been compromised because States have sought to impede prosecution where they view it as contrary to their interests. The power to impede, to filter and to shape case selection has therefore become a powerful instrument of foreign and domestic policy for States.

This thesis examines the factors affecting the 'independence' of prosecution case selection at the International Criminal Court (ICC) in Uganda, the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). I examine case

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[1] International crimes also include crimes against the peace (the crime of aggression). International crimes generally considered under customary international law to be those for which individual criminal responsibility may be applied. For an examination of these crimes see Antonio Cassese, *International Criminal Law* (2nd Ed), New York: Oxford University Press, 2008; Dapo Akande et el (eds), *Oxford Companion to International Criminal Justice* New York: Oxford University Press 2009: Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law*. Ardsley, NY: Transnational Publishers, 2003.

selection in what Kathryn Sikkink terms ‘international trials’ – trials of individuals (rather than states) for human rights violations in a particular conflict resulting from cooperation between multiple States, usually through the United Nations (UN).[2] International trials are the first of two streams of international crimes prosecution that Sikkink cites as driving individual criminal responsibility in international law towards ‘hard law’ status.[3] The second stream is domestic and foreign prosecution.[4] Sikkink claims that people working in like-minded governments and international and domestic Non Governmental Organizations (NGOs) drove these two streams, causing what she calls a ‘justice cascade’.[5]

I consider whether a cascade has occurred in international crimes prosecutions and whether normative factors constitute the dominant factor driving the independence of case selection at the Special Court, the ICTR, and the ICC.

A ‘cascade’ is the second of three stages of a norm’s life cycle cited by Finnemore and Sikkink. The first is ‘norm emergence’ when norm entrepreneurs with convictions about change emerge to use existing platforms to proselytize, causing states to adopt norms where it is politically expedient to do so. The second stage is the ‘norm cascade’, when after enough States adopt the norm; international influence without domestic pressure

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[2] Kathryn Sikkink, From State responsibility to individual criminal accountability: A new regulatory model for core human rights violations, in Mattli and Woods (eds.), *The politics of global regulation* (Princeton: Princeton University Press, 2009).
[3] Kathryn Sikkink. *The Justice Cascade: How human rights prosecutions are changing world politics*. New York: W.W. Norton and Company (2011), 96-7.
[4] Ibid., 97.
[5] Ibid., 98.

procures various levels of conformity. The third stage is ‘norm internalization’ when, over time, norms are internalized and professionals press for codification.[6]

A cascade presumes that enough States have adopted the norm of individual criminal accountability and that international influence, without domestic pressure, procures levels of conformity. A cascade constitutes “a rapid, dramatic shift in the legitimacy of norms and actions on behalf of those norms.”[7] Do ‘various levels’ of conformity constitute ‘rapid, dramatic’ shifts, or does it depend on the level of conformity? What if the level of conformity declines? If conformity declines, this thesis presumes, a norm is no longer ‘cascading’. It is in fact, ‘contracting’. In her analysis, Sikkink aggregates domestic (local prosecution of local crimes), foreign (prosecution of crimes committed elsewhere) and international prosecutions by courts and tribunals established by multiple actors under treaty or through the UN.[8] In doing so she states:

“The justice cascade is a dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (like trials) on behalf of those norms. It doesn’t mean that true justice will be done, just that the norm has new strength and legitimacy as we can see from how common it has become to put state officials on trial.”[9]

‘Strength’ and ‘legitimacy’ are bold claims, but do these claims apply to international criminal justice, and particularly to case selection norms at the ICTR, SCSL and ICC (in

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[6] Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52 (1998), 887-917.
[7] Cass Sunstein. *Free Markets and Social Justice.* New York: Oxford University Press, 1997; cited in Sikkink 2011, 8.
[8] Sikkink 2011.
[9] Ibid., 8.

the case of Uganda)? Sikkink's theory would suggest that the evolution of these tribunals would have applied greater cooperative pressure to State actors, greater delegation of case selection to international courts and, therefore, greater independence to prosecution case selection within those Courts, via international rather than domestic pressure. Sikkink makes the claim, for example, that the ICC constitutes a strong and independent court, without stating what 'independence' constitutes.[10] I focus on case selection independence because case selection is the court function of greatest political consequence and therefore an alternative, and arguably more illuminating, measure of normative pressures and a norm's cascade than the number of international crimes cases. In taking this approach I set out what independence is and how elements of independence can change. The thesis considers the quality of international crimes prosecution, not the quantity.[11]

Sikkink preferences domestic mechanisms, citing critics of the ICC as failing to understand the decentralized and secondary nature of international accountability systems while admitting that enforcement quality varies between countries.[12]

I concede that many elements of case selection independence at international courts remain vulnerable. However, many of those elements, particularly those relating to state cooperation, appointment of personnel, and process design, are even more vulnerable to political manipulation at the domestic level.

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[10] Ibid., 119-20.
[11] Chapter two explains my theory of case selection independence, including each element of independence and how that element may vary.
[12] Sikkink 2011, 19.

Sikkink cites a criminal process's need for a 'ruptured transition' that loosely correlates to an accused party in a criminal process losing power to those that try them. This situation, commonly cited as 'victor's justice,' was required in post-WWII Greece and Portugal, along with 1980's prosecutions in Argentina.[13] Those cases, Sikkink claims, demonstrate that the world is not static, that human agency has the capacity to transform conditions for political action by transforming the terrain of expectations. A ruptured transition (victory against a subsequently accused party) was no longer necessary by 1990, Sikkink claims, because those expectations demanded prosecution of international crimes.[14] Sikkink's position focuses on the local, and does not consider the global nature of a transition. In Latin America, where the majority of Sikkink's cases reside, global contestation was sparser than in Africa and Asia.[15] In Africa and Asia, global powers were not enthusiastic about prosecuting forces they were supporting against one another, or about encouraging human rights norms.[16]

Sikkink acknowledges that "the norm of individual criminal accountability of state officials for human rights violations is not anywhere near becoming internalized or taken for granted".[17] However, she also states, "whether a state official is prosecuted for human rights violations depends mainly on whether determined and empowered domestic litigants

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[13] Ibid., 59, 81.
[14] Ibid., 83.
[15] Global contestation was less evident in Latin America because of the United States (US) 1823 assertion that any attempted European aggression against a Latin American territory would be considered an act of aggression against the US. See: Frederick Merk. *The Monroe Doctrine and American Expansionism, 1843-1849*. New York: Knopf, 1966.
[16] Jean-Pierre Chrétien. *The Great Lakes of Africa.* Cambridge, MA: The MIT Press, 2003; Robert Gilpin. *The Political Economy of International Relations.* Princeton, NJ: Princeton University Press, 1987.
[17] Sikkink 2011, 12.

are pressing for accountability."[18] By considering the elements of case selection independence, one can better assess Sikkink's constructivist case that a cascade of international crimes prosecutions is being driven by the determined norm promotion of human rights advocates in government and civil society, rather than the more realist interests of States.

International relations theory can provide conceptual frameworks that help to address the question of why States create courts to address some international crimes but not others. Many of these courts prosecute crimes committed in territories where local populations or governments have had little influence over a court's design and power to prosecute. Despite this disconnect, the cases international courts choose to prosecute have significant political, security and economic consequences for States. These consequences may or may not be foreseen. Therefore, States wielding power over the design and function of a court have significant power over the State, and often the region, in which crimes occurred. The nature of a government's role in creating, designing and cooperating with courts is of increasing importance in international relations.

The variety of processes that the selection of cases to be prosecuted can initiate is wide and the outcomes of these processes important. From the vantage point of a government, investigation and prosecution of alleged State crimes may cause various levels of economic, political and other sanctions that can constrain the operation of key actors and the State apparatus. Sanctions may weaken a government's capacity to repel armed internal or foreign groups and may lend those groups legitimacy. They may also weaken the

[18] Ibid., 18.

government's domestic popularity. Conversely, prosecution of an armed group may entrench a government in power by stigmatizing certain groups or individuals and justifying sanctions that weaken the armed group's legitimacy. The power to influence which crimes are investigated can assist States in strengthening their legitimacy and in maintaining stability. For that reason, identifying the factors that affect the independence of international crimes case selection is important for scholars seeking to explain the emergence of international institutions empowered to take such politically significant action. Explanations emphasizing the role of norms suggest the normative power of international crimes prosecution is more instructive than States' interest in shaping international crimes case selection.

This project attempts to identify the factors affecting case selection independence, particularly whether normative factors constitute the primary driver of case selection independence in the three examined cases. However, identification of those factors may lead to further research examining other international courts or tribunals that could substantiate explanation of the emerging trend toward prosecution of international crimes at the international level. Prosecutions of international crimes are also occurring in greater number in domestic and foreign trials (foreign trials are those conducted in a single country for crimes committed in another country).[19]

The following sections describe the emergence of international criminal justice, the literature that examines the politics of case selection, and the elements of case selection independence. The summary of approaches to creation of variably autonomous

[19] Sikkink 2009.

international criminal justice institutions and processes explores the ambiguity or absence of guiding principles provided by theory. The section on the emergence of international criminal justice allows the various models of international criminal courts to be examined. A historical perspective illustrates and justifies the selection of each of the identified models of international court. It also introduces the impact of politics on case selection in international criminal justice. I then discuss the inductive methodology of 'grounded theory' that I employ to examine the elements of case selection independence in the context of the three selected cases.[20] Those sections are followed by an examination of some of the explanations of international institutional design, particularly those addressing international courts and tribunals, as well as legalization more generally. In examining international relations explanations I indicate how they might explain the phenomenon of variance in international crimes case selection independence. The introduction concludes with an outline of the remaining chapters.

1.2 The emergence of international criminal justice

The first international court to prosecute individuals for international crimes was the International Military Tribunal at Nuremburg in 1945-46. The Tribunal was established by the Allied Control Council, which received authority over the territory of Germany under the German Instrument of Surrender. Its members – the United Kingdom (UK), US, France and the Soviet Union – experienced disagreement internally and amongst each other as to the form transitional justice would take.[21] The Council empowered the Tribunal to charge senior military and political figures with crimes against peace, war crimes, and/or crimes

[20] Barney Glaser and Anselm Strauss. *The Discovery of Grounded Theory.* Chicago: Aldine, 1967.
[21] Bradley Smith. *Reaching Judgment at Nuremberg.* New York: Basic Books, 1977.

against humanity.[22] In the Pacific theatre, American General Douglas MacArthur, who effectively wielded interim power over occupied Japan, created the International Military Tribunal for the Far East in 1946. This court was empowered to try war criminals for conspiracy, crimes against peace, war crimes and crimes against humanity.[23] MacArthur appointed the eleven members of the court and its president. It tried senior military officers but exempted Japan's emperor and his family from prosecution and members of the bacteriological research programme.[24] These first international courts provided an example of selective application for subsequent international courts and tribunals.

During the Cold War, prosecution of international crimes was trumped by the principle of State sovereignty. At the end of the Cold War, however, a new power dynamic of western predominance at the UN Security Council, accompanied by human rights advocacy, caused the UN's role to shift from merely deterring aggression to a more encompassing commitment to justice, law and order within individual states.[25] In 1991 and 1992 the Security Council authorized military action in Iraq and peacekeeping in Somalia led by the

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[22] Article 6 of the Charter of the International Military Tribunal, London, 8 August 1945 defines the crimes against peace as: "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing", War Crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity", Crimes Against Humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"

[23] Article 5 of the Charter of the International Military Tribunal for the Far East, 19 January 1946, granted jurisdiction over the same crimes as those set out in the Charter of the International Military Tribunal (Nuremburg).

[24] MacArthur excused from prosecution the members of the unit in exchange for germ warfare data collected from human experimentation.

[25] Brian Urquhart. "Security After the Cold War," in Adam Roberts and Benedict Kingsbury (eds.) *United Nations Divided World: The UN's Roles in International Relations.* 2nd ed, New York: Oxford University Press, 2000, 82.

US. UN peacekeeping became a prominent Security Council response to episodes of instability and large-scale human rights violations.[26] In 1993, the North Atlantic Treaty Alliance (NATO) and the UN intervened in the conflict in the Balkans. The interventionist policy, as well as civil society condemnation of abuses in that conflict, led to the creation of the first international criminal tribunal since 1946 – the UN-created ad-hoc International Criminal Tribunal for the former Yugoslavia.[27]

Criminal justice processes became, and continue to be, a response to international crimes. Since 1993, five prominent criminal justice models have emerged. The first is that embodied by the 'ad-hoc international criminal tribunals' for the former Yugoslavia (ICTY) and Rwanda (ICTR).[28] The UN Security Council created the two courts under Chapter VII of the UN Charter in 1993 and 1994 respectively. This status guaranteed the tribunals UN funding as well as empowering them to compel the cooperation of other UN member states.

The second model, a 'permanent International Criminal Court' (ICC), emerged during the Rome Conference that concluded with the Rome Statute of the ICC in 1998.[29] Unlike the ad-hoc international criminal tribunals established by the Security Council to address specific episodes of international crime, the Rome Statute itself provided for the ICC as a permanent, standing institution.

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[26] Ibid., 82-103.
[27] James O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *The American Journal of International Law* 87:4 (1993), 639-659.
[28] Updated ICTY Statute, at September 2009; Updated ICTR Statute, at 31 January 2010.
[29] Rome Statute, doc A/CONF.183/9, 17 July 1998, Rome, Italy.

The ‘hybrid’ or ‘internationalized’ courts represent the third model. Like the ad-hoc international criminal tribunals, they address specific episodes of criminality. They are established, however, under the provisions of an agreement between the host state and the UN. The first hybrid or internationalized court was the SCSL in 2000, which was the result of an agreement reached by the government of Sierra Leone and the UN Secretary General, with the authorization of the Security Council.[30] Because the Security Council does not create the hybrids (as it does the ICTY and ICTR), they are not guaranteed funding from the UN. Instead they are dependent upon voluntary contributions from UN member states.

The fourth model is a domestic court created by the State in which it resides. Domestic courts seek to prosecute crimes committed domestically. These trials are either conducted according to the ordinary criminal justice system of the State in question or occur within special judicial mechanisms established under domestic law. Examples include the trials conducted or planned in Columbia and Uganda.[31]

The fifth model is the domestic exercise of universal jurisdiction. These proceedings do not require the crimes to have been committed on the territory of the State conducting proceedings. The model is exemplified by the proceedings against General Pinochet in

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[30] UN Security Council, *Security Council Resolution 1315,* 14 August 2000, S/RES/1315.
[31] Colombia and Uganda have established special judicial bodies within their own domestic justice systems to hear cases of crimes that would ordinarily fall within the jurisdiction of the Rome Statute.

Spain or Charles (Chucky) Taylor Junior by the US for international crimes committed in Chile and Liberia respectively.[32]

Although the ICTY and ICTR established norms of prosecution for violations of international humanitarian law, including genocide, war crimes and crimes against humanity, they refrained from prosecuting the crime of aggression. The case for aggressive war at the ICTR would have been difficult to substantiate but not impossible. The Ugandan government had supported The Rwandan Patriotic Front (RPF) in invading Rwanda from Uganda in 1990, an act that may have constituted aggression.[33] Aggression was excluded by the tribunal's limited jurisdiction over particular crimes and over a restricted time period (the 1994 calendar year).[34] However, in the former Yugoslavia, there was a more compelling case for the inclusion of the crime of aggression, given the engagement of NATO States. The legality of NATO bombardment as an act of self defence or as an act authorised by the Security Council has been contested.[35] Similarly, ICTY prosecution personnel viewed NATO officers as culpable for crimes under international humanitarian law but refused to prosecute them. Macedonian personnel, were prosecuted by the ICTY for crimes of lesser gravity.[36]

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[32] Both Mr Pinochet and Mr Taylor were indicted for crimes committed in their respective home States by prosecutors in other domestic criminal justice systems.
[33] Colin Waugh. *Paul Kagame and Rwanda: Power, Genocide and the Rwandan Patriotic Front*. Jefferson NC: McFarland and Company, 2004, 88-9; Wm. Cyrus Reed, "Exile, Reform, and the Rise of the Rwandan Patriotic Front," *Journal of Modern African Studies* 34 (1996), 479-501.
[34] UN Security Council, *Security Council Resolution 955 (1994),* 8 November 1994, S/RES/955, Annex - ICTR Statute.
[35] Aaron Schwabach, "The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia," *Pace Int'l L. Rev*. 11 (1999), 405.
[36] Xabier Agirre Aranburu, "Gravity of Crimes and Responsibility of the Suspect," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting International Crimes Cases*. FICHL Publication Series No. 4, 2009, 160-1.

Despite issues of potential selectivity, the presence of the ad-hoc tribunals galvanized international civil society and many developing States in their lobby for a permanent 'International Criminal Court'. These efforts led to a 1994 UN General Assembly (UNGA) resolution that called for the formation of a preparatory committee to advise on the establishment of an ICC.[37] The resolution signalled a shift away from the hegemony of the Security Council in controlling prosecutions in international criminal law. In 1998, one hundred and twenty countries voted to establish the Rome Statute of the ICC. Since then, one hundred and fourteen countries have become State parties to the Rome Statute. Since the ratification of the Rome Statute, several 'internationalised' courts have been created with UN assistance or under agreement between the UN and host States. These courts address international crimes (excluding the crime of aggression) in, for instance, Sierra Leone, Timor Leste, Cambodia and Kosovo, and political crimes in Lebanon. Three of the five permanent members (P5) of the Security Council; The US, Russia and China have not ratified the Rome Statute.

1.3 The literature examining the politics of international courts

The majority of the existing literature does not systematically link the elements of court design to State cooperation or theorize what constitutes prosecution independence in selecting crimes. Transitional justice literature on politics and international crimes prosecution primarily focuses on State cooperation.[38] Institutional design literature and that

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[37] UNGA, *General Assembly Resolution 49/53*, 84th plenary meeting, 9 December 1994, A/RES/49/53.
[38] See for example: Victor Peskin. *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Cambridge: Cambridge University Press, 2008; Carla Del Ponte. *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*. New York: Other Press, 2009; Phil Clark. "Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda," in Bowden et al (eds.) *Great Expectations: The Role of International Law in Restructuring Societies after Conflict.* Cambridge: Cambridge University Press,

examining the design of courts and tribunals prosecuting international crimes rarely engages with the literature on State cooperation.[39] As a result of this disconnect between design and cooperation, political scientists and legal scholars are only now beginning to fully explore the application of international relations and political theory to international criminal law.

Victor Peskin's seminal analysis of State cooperation at the ICTY and ICTR has been particularly instructive for my work.[40] Peskin's focus on cooperative practice identifies the ICTY's and ICTR's dependence on the extent to which they are empowered to compel cooperation. He notes that by employing a range of approaches, the tribunals enjoyed cooperation from some States but not others. Instead, the complexities of state cooperation and design policy required a different form of analysis. Peskin necessarily collated the effects of an emerging collective security structure, States' interests, and the organizational dynamics that instruct court interaction with States. His analysis demonstrates the importance of localized post-conflict politics in instructing State policy towards courts and advocacy groups. For example, Peskin asserts that the Rwandan government used geo-politics and global guilt over Rwanda's genocide to shield itself from the consequences of

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2009; Phil Clark, "Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda," in Carsten Stahn (ed.) *The International Criminal Court and Complementarity: From Theory to Practice.* Cambridge: Cambridge University Press, 2010.

[39] See for example Beth Simmons and Allison Danner, "Credible Commitments and the International Criminal Court," *International Organization* 64 (2010), 225–56; Bartram S. Brown, "U.S. Objections to the Statute of the International Criminal Court," *New York University Journal of International Law and Politics* 31:4 (1999), 855-892; *Zachary Kaufman,* "The United States Role in the Establishment of the United Nations International Criminal Tribunal for Rwanda" in Phil Clark and Zachary Kaufman (eds.), *After Genocide: Transitional Justice, Post-conflict Reconstruction and Reconciliation in Rwanda and Beyond*. London: Hurst, 2008.

[40] Peskin 2008.

belligerent non-cooperation with the ICTR.[41] International acquiescence to the Rwandan refusal to cooperate distinguished the ICTR from states under diplomatic and economic pressure from NATO to cooperate with the ICTY. Similarly, Adam Branch and Tim Allen have also explored the extent to which State and non-State actors have manipulated the ICC's function in Uganda, as well as the impact of ICC function on Ugandan politics and security.[42]

To explore court empowerment requires us to turn to court creation and design, and, ultimately, to what might explain States' positions and the power dynamics of negotiation. The Rwandan government clearly foresaw the relationship between design elements of international tribunals and the subsequent influence States would wield through cooperative leveraging. Zachary Kaufman has examined the creation of the Rwanda tribunal, particularly the power dynamics within and between States during Security Council negotiation of ICTR design.[43] Rwanda refused to vote in favor of the ICTR's statute, citing issues including location and appointment of personnel that would affect its capacity to influence the tribunal.[44]

Together, both Peskin and Kaufman suggest that States firstly develop policy regarding politically preferred case selection, before identifying and promoting legal and political theory that justifies a preferred design. However, neither traces the practical implications

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[41] Ibid.
[42] Tim Allen. *Trial Justice: the International Criminal Court and the Lord's Resistance Army.* London: Zed Books, 2006; Adam Branch, "The International Criminal Court's arrest warrants and the Lord's Resistance Army: Renewing the debate over amnesty and complementarity," *Harvard Human Rights Journal* 19, (2006), 267-273; Adam Branch, "International Justice, Local Injustice," *Dissent* 51:3, (2004), 22-26.
[43] *Kaufman* 2008.
[44] *Ibid.*

of this relationship. Ruth Grant and Robert Keohane distinguish between the design and functional elements of States' effect on institutional independence by distinguishing 'discretionary authorities' from 'instrumental agents'.[45] Discretionary authorities are constrained only by their mandate or jurisdiction. While Grant and Keohane do not speak specifically to criminal proceedings, their theory can be adapted. In the case of prosecution case selection, States would not expect to have any influence beyond the design of prosecution jurisdiction and would rely on *ex post* mechanisms for deterring abuse of power. An 'instrumental agent' prosecutor has their independence further compromised by States through *ex ante* mechanisms such as denial of investigative access to territory or withholding of finance. The absence of specific consideration of international criminal processes in Grant and Keohane's analysis causes them to miss some of the other *ex ante* or cooperative mechanisms affecting case selection independence. They include, provision of intelligence, access to and protection of witnesses, and apprehension of accused. I attempt to bridge these gaps. I examine the relationship between design and cooperation by combining a broader temporal scope, (including factors instructing institutional design) with a narrower functional focus – the independence of case selection.

1.4 The 'Independence' of International Crimes Case Selection at International Courts

In order to examine the factors affecting the independence of international crimes case selection, one must first be clear about how we define the 'independence' of this process. My interpretation employs the 'legalization' literature, which considers why, and to what

[45] Ruth Grant and Robert Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99:1 (2005), 29-43.

extent, States delegate certain tasks and responsibilities to international organizations instead of acting unilaterally or cooperating directly.[46] I adjust the analytical framework of legalization from judicial or administrative adjudication to prosecution case selection.

Abbott et al. describe 'legalization' as the extent to which rules and procedures hold obligation (are viewed as legally binding), are precise (specific and highly elaborated) and delegate authority to an international court or organization.[47]

The 'obligation' that a rule or procedure wields under international law ranges from a high obligation, in which a rule or procedure is viewed as binding upon States (*pacta sunt servanda*), to States' explicit rejection of intent to be bound by a given rule. Levels of obligation include an unconditional obligation, political treaties, national reservations or escape clauses, hortatory obligations, norms without law-making authority such as UNGA recommendations and explicit negation.[48] Under a legally binding agreement, States may assert legal claims, engage in legal discourse, invoke legal procedures and resort to legal remedies.[49] Brunnee and Toope present law as holding greatest legitimacy and persuasiveness in instructing State behavior when formalized by a wide range of States into a system.[50]

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[46] Darren Hawkin et al. *Delegation and Agency in International Organizations.* New York: Cambridge University Press, 2006.
[47] Kenneth Abbott et al, "The Concept of Legalization," *International Organization* 54:3 (2000), 401–419, 402-4.
[48] Ibid., 401–419, 409-10.
[49] Ibid., 401–419, 410.
[50] Jutta Brunnee and Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law," *Columbia Journal of Transnational Law*, 39 (2000-2001),19-74.

The ‘precision’ of a rule or procedure is the extent to which it is clear, unambiguous and narrows the scope for interpretation as to what is expected of States or other actors.[51] Precision ranges from rules with narrow issues of interpretation (high precision) through limited issues of interpretation, broad areas of discretion and standards of meaning only in reference to specific situations, to rules of ambiguity for which compliance is impossible to determine (low precision).[52]

‘Delegation’ of authority is the extent to which States provide authority to courts, arbitrators or administrative organizations to adjudicate decisions. Levels of delegation range from binding regulation with centralized enforcement (high delegation), through binding regulations with consent or opt-out clauses, binding internal policies (legitimation of decentralized enforcement), coordination standards, draft conventions, normative statements, to forums for negotiations (low delegation).[53] However, this analysis, as far as it evaluates adjudicatory independence (delegation), was taken a step further by Keohane et al. They place greater theoretical emphasis than Abbott and Snidal on the independence of adjudicating authority selection, and access of non-State actors to adjudicating institutions.[54]

[51] Abbott et al. 2000, 401–419, 412-3.
[52] Ibid., 401–419, 415.
[53] Ibid., 401–419, 416.
[54] Abbott and Snidal do identify the effect of State and non-State actors lobbying for favorable adjudicatory personnel as well as the role of non-State actor access to adjudicatory institutions and State policy makers without incorporating it explicitly into their theory of hard and soft law. Kenneth Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” *International Organization* 54:3 (2000), 421–456, 432, 451; Robert Keohane et al., “Legalized Dispute Resolution: Interstate and Transnational,” *International Organization* 54:3 (2000), 457–488.

Keohane et al. evaluate delegation based on ‘independence’, ‘access’, and ‘embeddedness’. ‘Independence’ is described as adjudicatory freedom from three institutional constraints: judicial selection and tenure (peer selection and long tenure through to State selection and short tenure), legal discretion to interpret standards and norms, and control over material and human resources.[55] Institutional ‘access’ refers to the breadth of actors that may prompt an institution to become seized of a matter and who may submit a claim to a tribunal (individual actors, groups and States through to States only).[56] Legal ‘embeddedness’ refers to State or institutional control over implementation or cooperation.[57] Less State control and more institutional control (particularly where supported by domestic jurisdiction to implement) provides greater embeddedness and delegation.[58]

Keohane et al. view the extent to which an adjudicatory body is willing to settle disputes against States as a key indicator of its ‘transnational’ status. They view the scope for State influence over selection of judges, available information, court finance (resource distribution relative to case load) and capacity to find facts as critical indicators of court independence.[59]

‘Independent’ prosecution case selection must also employ many of the above criteria or elements. These elements include the independence of a prosecutor to select crimes, the precision of the crimes the prosecutor is empowered to prosecute, the obligation of the law

[55] Keohane et al. 2000, 457–488. 460-2.
[56] Ibid, 457–488, 462-5.
[57] Ibid, 457–488, 466.
[58] Ibid, 457–488, 466-7
[59] Ibid, 457–488, 470-2

upon which the prosecutor acts and the extent to which the prosecutor must reside at an institution created to prosecute precise crimes of narrow interpretation and binding obligation under international law.[60] The prosecutor should enjoy full autonomy, including appointment by peers to long tenure, legal discretion to interpret standards and norms, and control over prosecution material and human resources.[61] Both state and non-state actors, as well as the prosecutor him or herself should be able to trigger the prosecution to be seized of a situation. A prosecution should have power to compel cooperation from States, including through domestic courts with provision of investigative access to territory, to witnesses, to information, documentation and databases, to the accused and full assistance in the apprehension of the accused and the protection of witnesses and investigative personnel.

The following chapter considers the variance in the above-mentioned elements of case selection independence. By considering the above elements, one can make a judgment on the independence of case selection at a particular court, and may comment as to whether prosecution case selection has become more or less independent over time. Put succinctly, independent case selection in international crimes cases requires a transnational institution with high levels of obligation, precision and delegation, including high levels of independence, access and embeddedness.

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[60] Abbott and Snidal. 2000, 401–419.
[61] Keohane et al. 2000, 457–488, 460-2.

Abbott and Snidal view high levels of obligation, precision and delegation as 'hard law' or fully legalized law.[62] As soon as the level of any one of the variables shifts into the realm of moderate or low, the law becomes soft. This might constitute any combination of high, moderate or low levels of any variable other than when obligation, precision and delegation are all high. A continuum is thus created from 'hard' through various levels of 'soft' to what would be considered the softest law (where all variables are low). An institution would be considered most independent under 'hard' law. Under hard law, rules fully obligate State compliance, provide little room for arbitrary interpretation, and delegate interpretative authority to an independent judicial body whose adjudication could be enforced by domestic courts.[63]

Keohane et al. describe institutions where society or individuals hold more control than governments over who judges (independence), what they judge (access), and judgment enforcement (embeddedness) as 'transnational' institutions.[64] When the three variables are low, 'interstate' institutions or processes provide States a high degree of control.[65] Like hard and soft law, the application of 'independence', 'access' and 'embeddedness' to institutions based on broad variability is not an exact science. As a consequence the application of 'interstate' or 'transnational' labels, like that of 'hard' or 'soft' law, are not binary in the sense that a range of institutional independence may constitute either description.

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[62] Abbott and Snidal 2000, 421–456, 422.
[63] Ibid, 421–456.
[64] Keohane et al. 2000, 457–488. 469.
[65] Ibid, 457–488. 469.

The literature cited above refers to judges or administrators adjudicating a diversity of disputes under international law. Abbott et al. cite the ICC, ITCY and ICTR as demonstrating high obligation, precision and delegation.[66] Under broad application of these principles, these courts might merit the status of 'legalized' institutions, particularly when compared with the Group of Seven largest economies.[67] However, upon closer examination, these courts appear to be acting under considerable constraint. For example, the Security Council retains the option to defer ICC cases on a rolling twelve-month cycle and to appoint the ICTR/Y prosecutor.[68] Further, the precision of prosecution case selection criteria varies between international courts and tribunals. Many elements of case selection independence, including the absence of a clear or consistently adhered to obligation to select or prioritize cases according to particular criteria, amongst other jurisdictional constraints, bring in to question international courts and tribunals' level of 'obligation', 'precision' and 'delegation'. Chapter two explores these elements and how they affect case selection independence.

Mattli and Woods view global regulation as a multi-stage process including agenda setting, negotiation, implementation, monitoring and enforcement.[69] There are two key phases in which the independence of prosecution case selection is affected.[70] The first phase is the agenda-setting, negotiation and design of a court. The second phase relates to a court's function – what Mattli and Woods would term the implementation, monitoring and

[66] Abbott et al. 2000, 401–419. 406, 416.
[67] This comparison is drawn by Abbott et al. in: Abbott et al 2000, 401–419, 406-7.
[68] Article 16 Rome Statute.
[69] Walter Mattli and Ngaire Woods. "In Whose Benefit? Explaining Regulatory Change in Global Politics," in Mattli and Woods (eds.) *The Politics of Global Regulation.* Princeton: Princeton University Press, 2009.
[70] These phases and the specific factors are described in detail in Chapter 2.

enforcement phases.[71] A court's design may affect prosecution case selection in a number of ways. The design may provide the prosecution with a very narrow or wide jurisdiction over a number of different variables. These include the crimes a prosecutor may prosecute, where and when those crimes occurred, by whom they were committed, and to what extent other States or multi-lateral institutions, such as the UN Security Council, must grant jurisdiction over a particular situation. Keohane et al. refer to such control of jurisdiction as 'gatekeeping'.[72] These jurisdictional elements of case selection independence are primarily concerned with 'delegation' to the prosecution of legal discretion to select cases. However, jurisdictional elements of court design are also, with the 'obligation' of the law, instructing case selection, as well as that law's 'precision'.[73] Court design also instructs the scope of State cooperative power over case selection. These design elements include a Court's location, personnel appointment processes, financial independence, and capacity to compel cooperation. These factors are also concerned with 'delegation' to Courts of control over material resources or State cooperation.[74]

The second phase in which prosecution case selection is affected, court function, is linked to court design, including the obligation and precision of law, and what Keohane describes as the 'legal embeddedness' and 'independence' elements of delegation.[75] Case selection during court function is affected by State cooperation. The dependence of the prosecution on State cooperation is instructed by the Court's enabling statute or legislation. For example, the Statute may assign funding responsibility to States or an impartial body, may

[71] Mattli and Woods 2009.
[72] Keohane et al. 2000,. 457–488, 459.
[73] Ibid., 457–488, 461.
[74] Ibid., 457–488, 462.
[75] Ibid., 457–488.

allocate responsibility for the appointment of personnel and compel State cooperation under law and via punitive processes. Other methods of State cooperation linked but not necessarily attributable to court design include: the supply of evidence and intelligence, investigative access to territory and suspects, and access to, and the protection of, witnesses. Courts may also be affected by cooperation from NGOs, particularly relating to access to evidence and witnesses. The power of a prosecution to compel State cooperation in these elements speaks to the legal embeddedness of a Court. In a situation of high embeddedness, a court could compel cooperation through domestic legal implementing mechanisms (autonomous national courts).

In the following chapter I examine the elements of prosecution case selection independence using examples from a range of courts to illustrate variance in independence and the way in which elements may affect one another or function in a coordinated way. I divide the elements under examination into two categories, jurisdiction and function.

Jurisdiction is divided up into six elements. The fist element is that of jurisdiction over persons, which is further divided into nationality of persons, institutional affiliation and primacy of jurisdiction. The second element is jurisdiction over crimes. Jurisdiction over crimes is further categorized by the nature of the crimes, as well as the elements of the crimes, including *mens rea*, *actus reas* and modes of liability. The third element is the territory over which a court wields jurisdiction, while the fourth element is the temporal jurisdiction of the court. The fifth element is the access to the court, instructing who can trigger an investigation to occur. The final element of jurisdiction oriented case selection independence is the case selection criteria a prosecutor may be directed to employ, including gravity, other considerations and seniority.

The functional group of elements includes court capacity to compel cooperation, fiscal independence and court location. Other elements of cooperation include apprehension of the accused, investigative access to territory, provision and appointment of personnel, access to and protection of witnesses, and provision of information from State and other actors.

Initiating and then shaping international crimes case selection via the aforementioned variables of jurisdiction and function has become a useful instrument of foreign and domestic policy for political actors. Case selection has also been a source of discontent amongst States that view its use as selective and inherently political. Certain States that believe they are selectively targeted for prosecution have expressed these views.[76] As a result, a body of literature is emerging that addresses the political nature of international criminal justice. Optimists view the emergence of international criminal justice as the start of an incremental journey toward addressing impunity for the worst crimes.[77] Another school of thought views international courts as instruments of power politics that harm rather than enhance global security.[78] Others still are cognizant of the politicization of

[76] Decision on the meeting of African states parties to the Rome Statute. In African Union (AU), Decisions and Declarations, Assembly of the AU thirteenth ordinary session, Assembly/AU/Dec.245(XIII), 3 July 2009.

[77] Antonio Cassese et al. *International Criminal Law: Cases and Commentary*. Oxford: Oxford University Press, 2011; Geoffrey Robertson. *Crimes Against Humanity: The Struggle for Global Justice*. New York: New Press, 2000.

[78] Mahmood Mamdani. *Saviors and Survivors: Darfur, Politics, and the War on Terror*. New York: Pantheon, 2009; Alex de Waal. "Darfur, the Court and Khartoum: The Politics of State Non-Cooperation," in

international criminal justice but are less certain about its trajectory or destination, or the deterrent effect it may have on future perpetration of international crimes.[79] The international criminal justice literature has yet to deconstruct comprehensively the elements of prosecution case selection independence, identify element variance, and explain the variance of those elements over time and between Court models. The literature on institutional design identifies elements of 'legalization' and explanations for its variance. However, it also trains its primary focus upon civil international disputes.

International criminal justice includes elements of independence from States that are novel or of elevated importance comparative to civil disputes. The marginal level of attention that international institutional design literature pays to international criminal justice constitutes a gap in the 'legalization' literature, but more importantly for this project, a gap in the international criminal justice literature. By focusing the institutional design and legalization framework upon international crimes case selection, this section attempts to (partially) fill that gap. This project facilitates a more technical formulation of what constitutes prosecution case selection independence in international crimes cases. Selection of international crimes cases is of critical importance to States and their citizens because it is the point at which international institutions encroach upon State sovereignty – where law meets politics.

Phil Clark and Nicholas Waddell (eds.) *Courting Conflict? Peace, Justice and the ICC in Africa.* London: Royal African Society, 2008.

[79] Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *The American Journal of International Law* 90:3 (1996), 501-510; Yves Beigbeder, *Judging War Criminals: The Politics of International Justice.* New York: St. Martin's Press, 1999; Peskin 2008; Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting International Crimes Cases*. FICHL Publication Series No. 4, 2009, 160-1; Clark 2010.

1.5 Sources and Methodology

The methodology adopted for this study is designed to enable an assessment of whether the 'independence' of prosecution case selection has strengthened or weakened, allowing an assessment of whether the justice cascade is occurring at the international level. Fieldwork and interviews were therefore combined with detailed analysis of documentation, both published and unpublished, on the design, operation and decisions of courts. The levels of information available for each of the three courts was not always consistent, so the methodology also had to be responsive to the need to maintain a strong basis for comparison between the three courts framed within the study – the SCSL (an internationalized court), the ad-hoc ICTR and the permanent ICC's proceedings in Uganda.

The three courts are themselves divergent institutions. The many ways in which the design and practice of these courts has differed includes the form of their creation and the negotiations over their design, their duration, their organizational affiliation, the source of their authority, their jurisdiction, the exercise of that jurisdiction, their case selection criteria, and their approach to prosecution within the context of continuing conflicts. The investigation of only three case studies means this research may merely indicate rather than clearly identify a trend in international crimes case selection independence at international courts and tribunals.

I now analyze my research sources before examining the methodological research theory that supports my approach.

Comparison between cases is enhanced by participant observation. Experience in the practicality of case selection and its implementation enhances understanding of the diversity of factors that affect it. My professional experience in investigative practices at Sierra Leone's Truth and Reconciliation Commission (SL-TRC), in implementation at the SCSL, in the witness protection design processes in Kenya and Uganda and in professional technical experience on witness related practice at the ICC and ICTR, provides a unique perspective as to how case selection and criminal justice design works in practice. Professional participation exposed me to elements of investigative and prosecution practice I would otherwise have a less sophisticated understanding of. That exposure also risks disproportionate explanatory emphasis, a potential bias I am conscious of. My participant observation experience extends only to the ICC Assembly of States Parties. That experience provided some insight into State bargaining, but was of course relatively limited in that I was not involved in bilateral meetings between State and non-State Parties.

My professional experience allows an insider's perspective of some of the most sensitive practices and policies relating to case selection. These include the criteria employed to identify cases for prosecution, and how key internal and external actors formulated case selection views and sought to pursue them. The practices also include the issues of information gathering and sharing, witness-oriented practices and State cooperation in investigations that are ordinarily deemed too sensitive to discuss with researchers. In a context where forensic and documentary forms of evidence are sparse, information provided by States and other intermediaries as well as witness testimony, is of considerable importance to proceedings. Insight into these critical elements of case selection independence provided an important addition to the matrix of legal and political variables observed in existing case selection-oriented literature.

Critical to acquiring an insight into the variance in case selection independence was access to those involved in Courts' design and those involved in case selection. The Institute for Security Studies, which supported professional research on witness protection, facilitated access to ICC, and ICTR personnel and domestic prosecution personnel in Kenya, Uganda, and South Africa. The SCSL also funded research in Kenya, Uganda, and South Africa and at the UN Office on Drugs and Crime (UNODC) in Vienna. In April 2009 I spent two weeks in Uganda and Kenya conducting research, and in June 2009 I spent a week in The Hague interviewing ICC personnel and stakeholders. As part of my work for the SCSL, I also conducted four weeks of research in South Africa, Kenya and Uganda in April 2008, followed by research in Vienna at the UNODC. That research was supplemented by interviews with prosecution, defence, judicial and registry personnel while working at the SCSL from February to June 2008 and while undertaking Masters research in March 2007. Many Special Court personnel had also worked at the ICTR. Over the course of 2009, 2010 and 2011, I conducted interviews with persons involved in the design of the ICTR, ICC and SCSL.[80] These interviews were conducted in The Hague, in New York City, London, Washington D.C. and via telephone. In October, November and December 2012, funded by the University of Auckland, I conducted further research in New York, Washington D.C., London, The Hague and Kampala. The persons interviewed were primarily government or former government actors, engaged civil society actors, and court personnel. The empirical data provided may not constitute the level of personal intimacy

[80] A list of interviews is included in the bibliography.

provided by a first-hand account from an actor at the apex of case selection decisions and bargaining.[81] However, research access to personnel involved in decision-making provided additional context and a greater understanding of the motivation for policy. This access complimented my own professional experience working at, or observing, the institutions under examination and provided a more objective view than persons involved in proceedings.

My interviews of court personnel focused on what they considered to be forms of pressure directed at case selection and the parameters under which they operated. I focused questions on the elements of case selection independence discussed in the following chapter and the interpretations of how normative and State interests shaped case selection independence. My questions were open-ended and I allowed the interviewee to drive the trajectory of discussion rather than attempting to impose a stringent framework. My approach was broadly the same when interviewing personnel involved in policy-making at the State level or institutional design at a forum such as the UN Security Council or Rome negotiations relating to the ICC. In these interviews I attempted even less to steer the interviewee in a particular direction so as not to impede the full range of factors and context that designing actors were considering when negotiating or identifying preferred elements of court design or degrees of cooperation. In the instances when interviewees did not speak to many of the variables my research had flagged, I pushed them to speak to those issues towards the conclusion of the interview.

[81] See for example: Del Ponte 2009.

Conducting interviews with prosecution personnel, civil society actors, and designing actors about the extent to which politics affects case selection is very sensitive. Individuals are or were acting in a very sensitive area of law under close scrutiny from a range of interested observers. The nature of their work can cause a tempering of their comment on the role of politics and case selection. To avoid professional or other interviewee repercussion I provided the option to anonymize interview citations by attributing only their institutional affiliation. My background at the SCSL provided me unique access to senior prosecution personnel, including those formerly holding senior positions at the other courts under examination and state actors engaged with international courts. Similarly, my work on the sensitive area of witness protection provided a degree of disclosure from interviewees perhaps otherwise unobtainable. I was very fortunate to encounter particular personnel at particular times when they were departing or about to depart their positions and felt less constrained by professional repercussion. However, I am of course cognizant that many interviewees may have withheld information for personal or institutional reasons.

The interviews drove me towards consideration of novel elements of, and explanations for, case selection independence. As I engaged in more interviews, observed proceedings and participated as an employee in the case of the SCSL, I began to identify applicable as well as empirically repudiated explanations for case selection. The explanation was shaped and re-shaped by further interviews, analysis of primary court documents and commentary, professional experience at, and working on, the courts, and examination of relevant literature, including grey literature. These data sources, examining historical as well as contemporary interests at the time of court design and function, all contributed to shaping explanations for each case, and observation of patterns that inform generalizations.

I am also cognizant of the disproportionate exposure I have had to the SCSL, as opposed to the ICC or the ICTR. I may have developed biases towards explanations of case selection behavior that are informed by disproportionate experience within the SCSL and in Sierra Leone generally. Similarly, these experiences have caused greater access to personnel involved in the SCSL's design and case selection than at the ICC or the ICTR. My continued professional work on the ICC has provided greater access to that institution than the ICTR. However, the greater elapse of time since the creation of the ICTR than the other examined courts provides a greater body of literature relating to the ICTR's design and function. It also diminishes the value of field research at the ICTR because many of the personnel involved in case selection had left before this project began. I have also been fortunate to have access to senior diplomats on the Security Council in 1994, to senior ICTR prosecution personnel, and to many senior prosecution and registry personnel that also worked at the SCSL. This previous knowledge provides the necessary categorical framework for the interpretation, description and explanation of the empirical world of international crimes case selection. This previous experience shall not constitute a pre-meditated framework into which empirical facts are forced. Instead, I shall use the empirical data to reshape both the framework and the investigation. In this sense, I shall make abductive inferences by putting old ideas together in a new way, constituting a new idea.[82]

[82] Douglas Anderson. *Creativity and the Philosophy of C.S. Peirce.* Dordrecht: Martinus Nijhoff, 1987, 47.

Participant observation and in-depth interviews instructed, and were instructed by, documentary analysis. This analysis corroborated many factual and theoretical claims forming much of the empirical foundation of this research, while debunking others. However, I am conscious of the fact that it may never be possible to totally free one's self from preconceptions in the collection and analysis of data, as Glaser and Strauss suggest is necessary.[83] These concerns are particularly apt for myself, having worked at or with the courts, and at a Truth and Reconciliation Commission. I have consistently vetted my analysis and thoughts for signs of bias and excluded it wherever it is detected.

I now consider how I use the data and how it fits my research agenda to test my hypothesis. A definition of independent international crimes case selection has been provided that shall frame or assist in the coding of the data that is procured from the three cases.[84] Coding is a technique employed in grounded theory research methodology to categorize data. The research supporting this thesis proceeds inductively, working backwards from the data to formulate theory about the explanation of case selection independence in the three examined cases. As data is collected I develop theory that informs the direction of further research into the levels of case selection independence at the three Courts, and the extent to which the power of norms or realist State interest explain case selection independence. I have used the literature to attempt to categorize data indicating high or low case selection independence, as described above. The following chapter further considers and demonstrates how each element affects case selection

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[83] D. James and G. Thomas "Re-inventing Grounded Theory: Some Questions About Grounded Theory and Discovery," *British Educational Research Journal* 32:6 (2006), 767-795.

[84] Barney Glaser and Anselm Strauss. *The Discovery of Grounded Theory: Strategies for Qualitative Research.* Chicago: Aldine, 1967.

independence. In identifying the normative or realist pressures that instruct case selection independence, I further code data in each chapter by considering, sequentially, how elements of case selection come to fruition. To do this I code according to what Mattli and Woods consider agenda setting (the historical background to Court design), negotiation (Court design), and implementation (Court function) of case selection.[85]

As permitted by Strauss's interpretation of grounded theory, I used a broad range of literature on the politics of case selection before beginning this research study.[86] I have developed a theory of case selection independence as I have proceeded with the help of legalization theoretical terminology, thereby maintaining theoretical sensitivity.[87] However, I have encountered the limiting elements that Glaser observes relating to presentation of research and positive and negative feedback. My approach has been to receive negative feedback constructively, using it as a source of fresh motivation and enthusiasm for novel concepts. Interaction with other scholars and assessors has affected my research, particularly my theoretical framework and methodological approach.

This thesis examines the extent of each element of case selection independence and attempts to draw connection among variance in individual elements and cumulative independence, and, determine whether case selection has become more or less independent over time. The research does not seek to attribute a binary status to State cooperation or the

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[85] Mattli and Woods 2009.
[86] In this sense I did not comply with the nature of the grounded theory research method according to Barney Glaser. Barney Glaser. *Basics of Grounded Theory Analysis: Emergence vs Forcing*. Mill Valley, CA: Sociology Press, 1992; Anselm Straus and Julliet Corbin *Basics of Qualitative Research. Grounded Theory Procedures and Techniques.* Newbury Park, CA: Sage, 1990, 56.
[87] Udo Kelle, " "Emergence" vs. "Forcing" of Empirical Data? A Crucial Problem of "Grounded Theory" Reconsidered," *Forum: Qualitative Social Research Sozialforschung* 6:2 Art 27 (2005).

independence of case selection in the three examined cases. Procuring a theory of increased or decreased case selection independence from the aggregated data will allow explanations that support or contest Sikkink's assertion of a 'justice cascade'.

The theory that is drawn from the data employs hypothetical reasoning, where logical hypothetical inferences serve to discover a hypothesis that explains certain empirical findings.[88] I shall therefore account for the fallible nature of theoretical claims that are based on hypothetical inference drawn from observed events that could be explained by other theories.[89] The findings of this thesis, therefore, shall provide cumulative and provisional evidence in support of explanations of case selection independence, and shall require further research for scientific corroboration or rejection.

Generalizations relating to the power of norms or realist State interest as explaining variance in case selection independence may demand further research. The literature is yet to deconstruct fully and confront the jurisdictional and cooperative elements of prosecution case selection independence. In the following chapter, this thesis draws upon the literature to break down systematically the dimensions of court design and function that constitute case selection independence. I also examine how those elements interact with one another. This provides for systematic comparison and accumulation of findings on a 'focused' theme of the extent to which norms or realist State interest affect case selection

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[88] Norwood Hanson. *Patterns of Discovery. An Inquiry Into the Conceptual Foundations of Science.* Cambridge: Cambridge University Press,1965, cited in Kelle 2005.
[89] Kelle 2005.

independence, and whether case selection has become more or less independent over time.[90]

The collected data and the method of its collection allows me to engage in the analysis of cases selected by the prosecution at each court, their justification for case selection, the pressures they felt they were under, and their interpretation of the sources of that pressure. It also provides the basis for, for example, analysis of the considerations available to the actors who designed the courts, including jurisdiction and scope for cooperative pressure from States: what their goals were, what they perceived the reasoning behind those goals to be, and the extent to which the context in which policy was formulated reflects that reasoning – i.e. what factors instructed each element of case selection independence? Similar questions may be made of prosecution personnel as to how they interpreted their jurisdiction, and what constraints they felt under from State cooperation or anticipated State cooperation.

1.6 Potential factors affecting case selection independence

This section offers a review of various explanations of the power of norms in shaping international institutions – explanations that may be endorsed or confronted by using case selection independence to test whether the norm of international crimes case selection is cascading.

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[90] Andrew Bennett and Alexander George. *Case Studies and Theory Development in the Social Sciences.* Cambridge MA: Harvard University Press, 2004, 67.

The legalization literature, as already discussed, does not consider case selection independence specifically. Instead it examines 'institutional independence' through the eyes of State delegation of authority to international institutions to select and try persons for international crimes. Hawkin et al. consider the same questions regarding States and international organizations. They draw on principal agent theory to suggest that institutional design is not inherently more difficult internationally than domestically, suggesting international institutions are better understood as bureaucracies of variable vulnerability to State manipulation.[91] The principal-agent approach is defined by Mark Pollack as one that:

"…draws from rational-choice theories of domestic and international politics, arguing that instrumentally rational actors (voters or legislators at the domestic level, states at the international level) delegate powers to executive and judicial agents systematically in order to lower the transaction costs of policy-making, and that in doing so they tailor the discretion of their agents, again systematically, as a function of several factors including the demand for credible commitments, the demand for policy-relevant information, and the expected gap between the preferences of the principals and the agents."[92]

Pollack also considers the criticism of principal agent theory from those that raise concern about the applicability of principal agent theory to trustees and not agents.[93] This argument suggests that, for the purposes of this thesis, prosecutors are able to act outside the

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[91] Hawkin et al. 2006.
[92] Mark Pollack. *Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications, and Empirical Disputes*. Paper prepared for presentation at the Workshop on Delegating Sovereignty, Duke University, 3-4 March 2006, 1.
[93] Pollack 2006, 2.

parameters set by States. Pollack suggests that this critique unnecessarily dichotomizes a continuum of agent discretion and a range of motivations for delegation.[94] Pollack's critique articulated above favors realist explanations of self-interested State actors. Sikkink's explanation suggests that the norm of prosecuting international crimes compromises the weighing of credible commitment and control of agents. At one end of the continuum, Majone, for example, cites a "complete, and in some cases irrevocable" transfer of principal's "political property rights" in a given issue-area i.e. total delegation.[95] In this sense, further defining the elements of prosecution case selection independence facilitates better identification as to at what point along the continuum of obligation, precision and delegation an agent (the prosecution) lies. Doing so allows analysis to identify (qualitatively) the degree of independence and avoid making binary assertions. Pollack also confronts the critique that argues principal-agent theory systematically fails to predict correctly the reasons and conditions for State delegation or the condition of autonomy enjoyed by the agent.[96] Pollack argues that the "failures to predict" criticism has been theoretically suggested, but not empirically supported. This research attempts, through documentary and field research, to best contextualize each court's design and function considering the historical and contemporary local, regional and global dynamics at play in each case. This approach seeks to mitigate the risk of undermining the extent to which examination of the three Courts indicates declining or increasing case selection independence, thereby supporting or contesting Sikkink's thesis of a 'justice cascade'.

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[94] Ibid.
[95] Giandomenico Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," *European Union Politics* 2:1 (2001), 103—21, 113, cited in Pollack 2006, 2.
[96] Pollack 2006, 2.

Miles Kahler explains State trends toward legalization by citing the effect on domestic politics of legalized agreements or institutions, empowerment of domestic actors, deepening of norms and furthering of a variety of State interests.[97] These explanations, like functionalist explanations, draw on principal-agent theory. Functionalist explanations state that governments choose legalized institutions where the benefits of collective action and cooperation outweigh sovereignty and other costs of legalization.[98] Abbott and Snidal cite the value of more credible government commitments to other States, greater State compliance, and the transaction costs of variation in position between negotiating regimes over a long time as encouraging legalization.[99] Transaction costs include the cost of negotiating courts and their design and the costs of contestation of a dispute were courts not to exist. In international crimes case selection, transaction costs include, but are not limited to, the cost of Court negotiation, and the cost of ceding sovereignty as against the cost of an absent punitive deterrent to potential perpetrators.

Abbott and Snidal evaluate the extent to which States perceive the costs of State-to-State contestation as outweighed by the costs of setting up an independent authority, as well as the costs of disputing imprecise contracts and the cost of renegotiating agreements outside a legitimate authority.[100] Abbott and Snidal view sovereignty and future uncertainty about security and economic shifts in an institution's direction as deterring States from legalization in many instances.[101] Abbott and Snidal also predict variance as to which

[97] Miles Kahler, "The Causes and Consequences of Legalization," *International Organization* 54:3 (2000) 661-683, 662.
[98] Ibid.
[99] Ibid., 661-683, 663.
[100] Ibid., 661-683, 663.
[101] Ibid., 661-683, 664.

elements of legalization States allow based upon whether costs are viewed as uncertain or related to sovereignty. They view high uncertainty and low sovereignty costs as likely to produce institutions with high obligation, low precision and medium delegation. This would mean that if a government perceived the likelihood of its own nationals being selected for prosecution as very low, it would seek to design a court with highly obligatory case selection law, low precision as to who should be selected and medium delegation of power to determine who will be selected and who will not.

The forum in which courts are created, and in which they assert jurisdiction over particular crimes may affect the number of States negotiating court design, the degree of State consensus, and the level of influence individual States wield over the design process. It may also influence the access of non-State actors to the design process. One explanation of variance in independence is Epstein and O'Halloran's argument that under a unified government, the legislature tends to delegate power to executive branch agencies, while under divided government legislatures delegate more to independent agencies or commissions.[102] This theory suggests that the greater consensus there is amongst designing States the more prosecution case selection will likely be accountable to those States. Conversely, the greater the division amongst designing States, the greater the independence granted to prosecution case selection.

[102] David Epstein and Sharyn O'Halloran. *A Transaction Cost Politics Approach to Policy Making Under Separate Powers*. New York: Cambridge University Press, 1999.

In considering the impact of the nature of the forum of court creation, Pierson suggests consideration of path dependence, the timing and sequence of design, the significance of slow moving processes and the problems of institutional origins and change.[103]

One explanatory theory for each examined Court's case selection is 'path dependence'. The theory of path dependence in institutional design asserts that once an institution has started down a track, for example investigating a particular individual with a view to indictment, or seeking to establish a court with jurisdiction over certain persons, the costs of reversal are very high.[104] A path is entrenched by increasing returns. Increasing returns occur where a decision or policy is adopted and self-reinforcing processes, or institutionalized positive feedback, entrenches that policy on one hand, and burdens efforts at amendment on the other.[105] The theory of increasing returns suggests that personnel enthusiasm provides positive feedback that reinforces institutional confidence in case selection and decreases the chance of change.[106] Path dependence therefore challenges existing political science explanations that attribute large outcomes to large causes.[107] The analysis of timing, sequence and the capacity of rational actors to design and implement optimal solutions emphasize an institution's embryonic stage.[108] Path dependence might explain variance in case selection independence by examining the relationship between historical narratives, state policy toward courts, and the extent to which institutionalization

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[103] Paul Pierson. *Politics in Time: History, Institutions, and Social Analysis*. Princeton: Princeton University Press, 2004.
[104] Margaret Levi. A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis," in Mark I. Lichbach and Alan S. Zuckerman (eds.) *Comparative Politics: Rationality, Culture, and Structure*. Cambridge: Cambridge University Press, 1997, 19-41, 28.
[105] Paul Pierson, "Increasing Returns, Path Dependence and the Study of Politics," *The American Political Science Review* 94:2, 2000, 251-267.
[106] Ibid.
[107] Ibid., 251-267, 251.
[108] Ibid., 251-267; Paul David, "Why are Institutions the 'Carriers of History'?: Path Dependence and the Evolution of Conventions, Organisations and Institutions," *Structural Change and Economic Dynamics*, 5:2, Oxford University Press, 1994, 205- 220.

of international crimes case selection 'locks in'[109] historical narrative and State policy at the time of court design.

Mattli and Woods would explain case selection at international courts and tribunals as requiring fairness, transparency, accessibility and openness, which is difficult in global politics.[110] Mattli and Woods note that critics who expect states to shape the rules of the game in their own interests (regulatory capture) also cite global regulation as mitigating inefficiencies and old-fashioned value systems subservient to corrupt national elites.[111] To achieve regulatory change, they cite the need for communication of deficiencies and biases to negatively affected constituencies as well as entrepreneur collaboration with committed allies in support of shared ideas about change at every revisionary stage.[112] Under such circumstances, capture of regulation by large corporations, the US, and the European Commission, as suggested by John Braithwaite and Peter Drahos,[113] is confronted by the demands of those outside that constituency. However, Drezner views even these efforts as substantially constrained by the ability of great powers such as the US and European Union (EU) to coerce others into compliance.[114] An element that limits the extent to which an actor is constrained is their mandate. Tamar Gutner cites an 'antinomic' mandate, which includes potentially conflicting goals such as prioritization of cases based on 'gravity' and 'the interests of justice', as potentially facilitating gaps between mandate and

[109] David 1994, 205- 220; Pierson 2000, 251-267.
[110] Mattli and Woods 2009.
[111] Ibid.
[112] Ibid.
[113] John Braithwaite and Peter Drahos. *Global Business Regulation*. Cambridge: Cambridge University Press, 2000.
[114] Daniel Drezne, *All Politics is Global: Explaining International Regulatory Regimes.* Princeton: Princeton University Press, 2008.

performance.[115] In such instances, functional rather than jurisdictional constraints are more instructive as to the extent to which case selection independence can be viewed as embedded in politics, as explanations by Goldstein et al. suggest.[116] Goldstein et al. may view codification of case selection criteria that binds a prosecutor as a battle between 'legalists' seeking clear rules and 'pragmatists' demanding greater scope for power and diplomacy.[117] For the purposes of this thesis, I consider whether, as Sikkink suggests, the 'legalists', the entrepreneurs and their allies, rather than the 'pragmatists' and the interested States, are shaping case selection independence at the examined Courts.

Where legalists make gains, realists interpret rules and delegation as coming from dominant powers to bind weaker system members. Realists also view rules that are inconsistent with power realities, such as those requiring nationals of powerful States to be prosecuted, as vulnerable to collapse when pressured.[118] They may view application of case selection within parameters controlled by powerful States as enforced only where strong States are willing to bear enforcement costs.[119]

Realist explanations vary from Abbott and Snidal's institutionalist explanations of variance in obligation, precision and delegation discussed above. Institutionalist and functionalist explanations are not mutually exclusive. Hard or soft law might be viewed as the greatest balance between the cost of setting up courts and the court's role in reducing uncertainty

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[115] Tamar Gutner, "Explaining the Gaps Between Mandate and Performance: Agency Theory and World Bank Environmental Reform," *Global Environmental Politics* 5:2 (2005), 10-37.
[116] Judith Goldstein et al., "Introduction: Legalization and World Politics," *International Organization* 54:3, (2000), 385–399, 387.
[117] Ibid., 385–399.
[118] Ibid.
[119] Ibid.

and transaction costs relating to case selection. Liberalist theory contends that domestic civil society actors pressure States to act against realist interests by empowering transnational institutions to develop and enforce rules.[120] Rationalists view actors as motivated by material interests to resolve problems of coordination, collaboration and domestic politics by changing incentives or material features of interaction.[121] Constructivists view those rules as shared international norms shaped by morally or socially motivated intra-governmental actors but do not distinguish between the norms and willingness to enforce them.[122] Constructivists view these shared norms as creating compliance pull through persuasion, imitation and internalization to modify inter-subjective understandings of appropriate behavior.[123] Abbot et al. note the role of agency within transnational justice institutions as well as the design and cooperation means of constraining that agency.[124] Of particular relevance to international crimes case selection is Abbott et al.'s identification of the Security Council as legitimating and constraining States by instructing what is acceptable and what is not.[125] However, this assertion is premised on a level of Security Council legitimacy derived either from its impartial function or its representation of global power dynamics. David Malone, for example, queries whether the Security Council is more than the sum of its parts – whether the "key driver in Council decisions today, both actively and passively, is the agenda of the US."[126] Considering the Security Council's role in the three cases of case selection independence allows this thesis

[120] Ibid.
[121] Abbott and Snidal 2000, 421–456. 424.
[122] Thomas Franck. *The Power of Legitimacy Among Nations*. Oxford: Oxford University Press, 1990; Abbott and Snidal, 421–456. 425.
[123] Ibid., 421–456. 425.
[124] Abbott et al. 2000, 401–419, 402-4, 418.
[125] Ibid, 401–419, 402-4, 417.
[126] David Malone. *The UN Security Council: From the Cold War to the 21st Century*. Boulder, CO: Lynne Rienner, 2004, 2.

to indicate an extent to which the Security Council acts as a force legitimating and constraining State behavior or advancing and entrenching global power dynamics. Acknowledging the diversity of potential causes of legalization, Abbott et al. cite reciprocity, reputation, damage to valuable State institutions and other normative and material considerations as possible explanatory variables.[127] They view designing actors as shaping the agenda and initiating proceedings and judges, or, for our purposes, prosecutors as typically alert to political implications of decisions.[128] This thesis, by examining the key actors, indicates whether prosecution personnel have become more or less alert to, and more or less influenced by, the political implications of case selection decisions.

One explanation that errs on the side of more realist explanations of the emergence of international criminal justice is that the production of soft law by powerful process-shaping actors turns international normative systems, such as international criminal courts, into instruments no longer serving their purpose.[129] Considering whether case selection independence has strengthened or weakened assists consideration of the power of the norm of international crimes case selection. Abbott and Snidal provide a number of explanations for State creation of law and institutions they may subsequently, or during design, constrain (soft law). States may firstly wish to share the benefits of hard law while avoiding the costs of establishing means of resolving numerous international disputes on each occasion.[130] Soft law, they believe, more easily procures consensus amongst States that are jealous of sovereignty compromise and wish to be able to deal with uncertain

[127] Abbott et al. 2000, 401–419, 402-4, 419.
[128] Ibid., 401–419, 402-4, 419.
[129] Prosper Weil, "Towards Relative Normativity in International Law?" *The American Journal of International Law* 77:3 (1983), 413-442, 423 cited in Abbott and Snidal 2000, 421–456. 422.
[130] Abbott and Snidal 2000, 421–456. 423.

institution or rule outcomes over time.[131] This thesis suggests that States would opt for less obligatory or precise law in order to facilitate greater participation in international crimes case selection, but greater State control of process. The critical variables Abbott and Snidal view States as confronting are: the cost of settling individual disputes, the uncertainty of rule or institution outcomes, the implications of a rule or institution for State sovereignty, the divergence of preferences amongst designing actors, and the power differentials amongst those actors.[132] For this thesis, these variables translate to the cost of States selecting cases for prosecution themselves after each episode in which international crimes occur, the uncertainty of a prosecution case selection at an international court, the implications of a case selection rule for State sovereignty, the discrepancy in preference for case selection independence at a court among designing actors, and the power differentials among those actors. While Abbott and Snidal primarily consider the role of States, they also consider other actors in explaining how the aforementioned variables instruct design of obligation, precision, and delegation. When States are able to obtain institutions or rules reflecting their interests, they pursue hard law to further their interests (contracts) or entrench preferred normative commitments (covenants).[133] The goals of norms and interests, Abbott and Snidal conclude, are often deeply intertwined. Actors use both normative and interest-based strategies to create arrangements such as international criminal courts that appear to be to be hard law, but are modified to shape norms and their application.[134] Control of these arrangements provides credibility to designing actors by obtaining advocacy group support, and lends legitimacy to retaliatory action against actors

[131] Ibid., 421–456, 423.
[132] Ibid.
[133] Ibid., 421–456, 424.
[134] Ibid., 421–456, 425.

in breach of created arrangements.[135] Abbott and Snidal suggest that the 'harder' the law is, the more credible the State commitments. However, subtly diminished precision, along with subtle methods of delegation, is of great design utility for actors attempting to facilitate selective application of a norm.[136] These subtleties are precisely why defining and considering the independence of case selection so illuminates the cascade of international crimes prosecution.

Abbott and Snidal find that States pursue 'harder' law when advantageous politically, including wielding resources and personnel, when confident that agreements or courts reflect their preferences, when political cost of court creation is low.[137] In instances of confidence, such as a victory in civil conflict where design control is high, high precision would be sought.[138] Where confidence is low and design is contested, soft law provides for escape clauses, imprecise commitments and politicized delegation so actors can agree, learn consequences, and avoid sovereignty costs.[139] Abbott and Snidal view increased sovereignty costs of court creation as driving softer legalization or hard law where long processes of legalized cooperation bind States or where strong commitment to sovereignty reduction is apparent. They view the benefactor of soft law's creation as unclear. That is, does soft law protect the weak from the powerful, or is that the sole purview of hard law? Abbott and Snidal view legally binding and relatively precise rules as allowing strong and weak States to regularize asymmetric relations through rules entrenching powerful State

[135] Ibid., 421–456, 427.
[136] Ibid., 421–456, 430-2.
[137] Ibid., 421–456, 432-3.
[138] Ibid.
[139] Ibid., 421–456, 434.

advantage while providing weaker States certainty.[140] A statist perspective views strong States as seeking weak delegation so as to provide more easily manipulated institutions while weak States prefer delegation to mitigate domestic responsibility for sensitive issues.[141] Considering case selection independence will facilitate the opportunity to consider whether independence increases when weaker States are involved. Abbott and Snidal's theory suggests that greater design participation by weak states facilitates greater independence and a cascade of the norm of international crimes prosecution.

Pluralist explanations preference the role of private actors commonly demanding hard law, a view explained by their increased access to international Courts and Court design that prompt State actors to allow minimal gains for political support while securing political outcomes.[142] Abbott and Snidal view the rate of hardening legalization as likely to slow in congruence with the slowing rate of globalization, suggesting the justice cascade may plateau or even contract.[143] Beth Simmons, like Sikkink, views international human rights law as making a positive long term contribution to human rights behavior in much of the world by changing domestic legislative agendas, political coalitions and parameters of acceptable State action.[144] Simmons argues that States that ratify treaties improve human rights practices more than those that do not.

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[140] Ibid., 421–456. 448.
[141] Legalization bargaining is a process where powerful States, to the extent they offer weak States sufficiently lucrative terms to procure participation, create efficiency gains such as the shaping of war crimes investigations. Abbott and Snidal 2000, 421–456, 449, 452.
[142] Abbott and Snidal 2000, 421–456, 451, 3, 5.
[143] Ibid., 421–456. 456.
[144] Beth Simmons. *Mobilizing for Human Rights: International Law in Domestic Politics.* New York: Cambridge University Press, 2009.

Simmons and Allison Danner find that credible commitments theory explains ratification of the Rome Statute by States whose citizens are both least and most vulnerable to ICC case selection.[145] Those States most likely to experience case selection seek to reduce violence while least likely States seek to foreswear atrocities.[146] One possibility this thesis will test is whether Simmons and Danner's explanations of weak State engagement may have failed to consider weak States' increased power to shape case selection through negotiated State referral provided by ratification. Some weak States may have decided that it is better to control the scope of referral, such as in Uganda, than not sign up and have jurisdiction imposed upon them, as in the case of Sudan. Simmons and Danner cite existence of 'obligation' and the emergence of 'delegation' but note, citing Jack Snyder and Leslie Vinjamuri, delegation's relative impotence in the criminal law sphere.[147]

As is the case with Simmons and Danner, Kathryn Sikkink holds many variables constant in her explanation of international crimes prosecution as a norm in the phase of cascade. Because of the variance in multiple elements of case selection independence,[148] this thesis examines the SCSL (an internationalized court), the ICTR, and the ICC's proceedings in Uganda. Variant elements in Court design that may affect case selection independence include, but are not limited to: organizational affiliation, the source of empowering authority, the extent to which less powerful States were able to influence creation or assertion of jurisdiction, the forum (agreement, Security Council resolution, international

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[145] Allison Danner and Beth Simmons, "Credible Commitments and the International Criminal Court," *International Organization* 64 (2010), 225–56, 225.
[146] Ibid., 225–56, 225.
[147] Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28:3 (2003/04), 5–44 cited in Danner and Simmons 2010, 225–56, 226.
[148] Luc Cote, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law," *Journal of International Criminal Justice* 3:1 (2005), 162-186, 168.

Statute) of creation or exercise of jurisdiction, the length of design negotiation, the global, domestic and regional power dynamics at the time of creation, political willingness to prosecute all parties to a conflict, and the extent to which hostilities were continuing at the time of Court design or functional case selection. Examining how these and other contextual elements affect the design and function elements of case selection independence at each Court will allow me to draw preliminary conclusions about the causal conditions of norm cascade or contraction.

Keohane et al. go furthest in unpacking case selection independence elements but this deconstruction better explains civil rather than criminal international processes. They suggest that the sharpest State struggles will arise during design and that attempted explanation should focus on Court willingness and ability to decide disputes against States,[149] or for my purposes to select cases against the interests of actors designing courts or triggering jurisdiction. The empirical chapters of my thesis examine the interests of States involved in Court design, the historical context of Court design, and how those interests and circumstances, along with circumstances leading to actual case selection, instructed greater or diminished case selection independence.

1.7 Organization

The structure of analysis described in chapter two draws on the literature relating to legalization. Developing the technical components of legalization helps demarcate the jurisdictional and functional elements of case selection independence of criminal rather than civil international trials. Each element of design that affects case selection will be

[149] Keohane et al. 2000, 457–488. 469.

examined on its own merits and in relation to its effect on other elements affecting case selection.

Chapter three considers the potentially cascading nature of the ICTR. The ICTR, designed with a broad mandate a year after its sister tribunal for the former Yugoslavia, was located outside Rwanda and was not endorsed by the Rwandan government. The chapter traces the consequences of attempted norm entrepreneurship within the prosecution as the Rwandan government employed cooperative measures to constrain independent prosecution case selection.

Chapter four addresses the case of the SCSL, which was designed in a period of donor fatigue by comparatively few States, after a comprehensive military victory to a party to the conflict who drew on a switch of US allegiance. By providing the historical context to the Court and the concluding years of a regional conflict, this chapter places Court design and subsequent State cooperation within the context of engaged civil society actors and local, regional and global State interests.

Chapter five contrasts narrow participation in design of the Special Court with the vast breadth of participation at the ICC. It examines the historical context of the ICC's design, the context of Uganda's negotiated referral of jurisdiction to the ICC, and the subsequent investigation and selection of cases in the Ugandan situation. The contextualization of the Ugandan case also considers other situations, and potential situations before the ICC.

The conclusion evaluates the extent to which the examined cases indicate an increase in case selection independence, thereby indicating a ‘justice cascade’. The conclusion refrains from attributing quantitative value or weight to particular elements of case selection independence. However, it does suggest preliminary qualitative findings relating to the impact of some elements of case selection independence compared to others, and the impact of some contextual factors that affected case selection independence. In doing so I indicate which international relations explanations of the norm of international crimes prosecution are best supported by the three cases. I conclude by hypothesizing as to the norm of international crimes prosecution’s direction, and suggest avenues of further research.

Chapter 2

Scope for State Influence: The jurisdiction and cooperation variables

2.1 Examining elements of case selection independence

Case selection affects the perception victims and other affected communities have of justice processes. It also affects the legitimacy of prosecutions in the eyes of States and the international community.[150] Independent case selection, therefore, promotes legitimacy, consensus and increased support among the international community.[151] However, case selection also has significant political and in some instances security and economic consequences. The problem, according to Goldstein et al. is that law is "embedded in politics (affected by political interests, power and institutions)."[152] Conversely, law and 'legalization' affects political outcomes, making law's relationship with politics a reciprocal one mediated by international institutions.

Whether intended or not, the environment in which prosecutors function will have some conscious or sub-conscious effect on their case selection decision-making.[153] It is therefore important to understand the identity and role of what Morten Bergsmo calls "interpretation

[150] Morten Bergsmo, "The theme of selection and prioritization criteria and why it is relevant," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 16.
[151] Rolf Fife, "Criteria for prosecution of international crimes: the importance for states and the international community of the quality of the criminal justice process for atrocities, in particular of the exercise of fundamental discretion by key justice actors," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 24.
[152] Goldstein et al. 2000, 387.
[153] Martha Finnemore and Kathryn Sikkink, "Taking stock: The constructivist research program in international relations and comparative politics," *Annual Review of Political Science* 4 (2002), 391-416.

constituencies."[154] He defines interpretation constituencies as comprising victims' groups, academics, NGOs, other legal practitioners and States. The important question he poses, particularly relating to States is to ask which States and State interests speak most loudly?[155]

This thesis focuses on the role of states comparative to norm entrepreneurs. It does so because States, given their prominence in designing courts and their capacity to cooperate or not, bear greatest influence over case selection. My analysis of the three cases will incorporate the influence of victims, NGOs, academics and legal practitioners on States. As we have seen, the technical elements of case selection independence at courts trying international crimes is inadequately identified by the legalization literature that speaks predominantly to civil proceedings. Literature seeking to explain State ascension to international courts, such as that by Simmons and Danner, consequently emphasises States' claims rather than their actions.[156] By identifying the elements of case selection independence, we can better weigh realist and constructivist explanations of State engagement and can better determine whether the norm of international crimes prosecution is cascading at international courts. The Forum for International Criminal and Humanitarian Law (FICHL) has taken the first steps towards examining these practices in its edited volume based on a conference seminar on 'Criteria for Prioritizing and Selecting

[154] Morten Bergsmo. *Dispassionate, objective and independent application of law when the conscience of humanity is shocked: tentative remarks on the context of interpretation in international criminal justice*. Seminar in honor of President Philippe Kirsch, The Hague, 6 February 2009.
[155] Ibid.
[156] Simmons et al. 2010.

International Crimes Cases'.[157] Prosecution personnel from courts trying international crimes attended the 2008 seminar, which was the first gathering of its kind. However, the FICHL conference did not define case selection independence. This chapter draws upon views expressed by prosecution personnel, as well as from case selection literature and jurisprudence to identify how the elements of case selection independence identified in the introduction affect case selection.

The legalization literature categorized the elements of legalization according to 'obligation', 'precision', and 'delegation'. However, Mattli and Woods note that global regulation is a multi-stage process including agenda-setting, negotiation, implementation, monitoring and enforcement.[158] The material to be presented will relate to the court design phase, and the functional phase. This method departs from the 'obligation,' 'precision' and 'delegation' framework, in which 'delegation' conflates the design and function phases of State engagement.

I begin by examining the various elements of design that affect case selection independence directly, by defining a Court's jurisdiction. The chapter then considers those elements of court design that facilitate scope for State influence through cooperation, as well as considering the elements of cooperation that States employ. The chapter then describes the methods of cooperation available to States to affect case selection once courts begin to function. In describing both design and cooperation elements I will draw on

[157] Anees Ahmed and Margaux Day, "Prosecution Criteria and the Khmer Rouge Tribunal," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 83; Saffon 2009, 100.
[158] Mattli and Woods 2009.

examples as well as hypothesise as to how States might utilise these instruments. Considering the elements of court 'design' and then 'cooperation' better facilitates analysis of the role of State and non-State actors in agenda-setting, negotiation, implementation and enforcement phases. This is because the design and cooperation model allows the cooperative behaviour to be traced back to the elements of design that facilitate it, and back to the agenda-setting phase in which State or non-State actors drove the agenda that shaped expectations for design.

This analysis of State behaviour informs explanation as to the role of States in prosecution case selection at the examined courts. It therefore better illuminates the demarcation of a 'justice cascade' in which independence increases, a 'justice plateau' in which independence remains constant, or a 'justice contraction' in which independence declines.

2.2 Court Design of Jurisdiction

2.2.1 Jurisdiction over Persons

Of particular utility to politically inclined designers of courts prosecuting international crimes is the capacity to exclude from prosecution jurisdiction, specific groups of people based on nationality, race, or other affiliation. This method speaks to State capacity to control 'delegation' of jurisdiction over persons and is particularly overt in its politicisation of prosecution case selection.[159] The Statute of the SCSL, for example, specifically removes peacekeeping personnel and any private military contractors or forces fighting under agreement with the government of Sierra Leone from the Court's

[159] Abbott and Snidal 2000.

jurisdiction.[160] This method explicitly lends immunity to personnel specific to a party, to a conflict but could also be applied to nationality, political, religious or other group under an amnesty provided within an empowering statute or peace agreement. States may also overturn an empowering statute with a subsequent peace agreement or international treaty, as occurred in Bangladesh in 1973. There, an international crimes tribunal was granted "power to try and punish any person irrespective of his nationality" for international crimes.[161] However, Bangladesh released 175 accused Pakistani forces in return for a qualified apology by Pakistan for crimes by Pakistani forces. The Bangladeshi government preferred international recognition of the Bangladeshi state, UN membership, and international trade over prosecution of alleged Pakistani war criminals.[162] Upon commencement of proceedings in 2010, only Bangladeshis were arrested despite the overwhelming number of cited crimes allegedly committed by Pakistani forces.[163] The current prosecutors are under government instruction not to indict Pakistani forces.[164]

The ICC holds greatest jurisdiction over persons, although its jurisdiction over some persons is more limited than others. All States that have ratified the Rome Statute subject their nationals, and persons acting on their territory, to the jurisdiction of the Court.[165] The UN Security Council may refer jurisdiction over a situation to the ICC even if the State in

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[160] Article 1(2) SCSL Statute, 14 August 2000, Freetown: Sierra Leone, http://www.sc-sl.org (accessed 10 January 2007).
[161] Section 3(1)(a), International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973).
[162] Jordan Paust and Albert Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience," *Vanderbilt Journal of Transnational Law* 1(11) 1978, 1-38; Stephen Kay, "Bangladesh War Crimes Tribunal: A Wolf in Sheep's Clothing?" *International Criminal Law Bureau*, 13 October 2010.
[163] Kay 2010.
[164] Sanaul Huq, *Prosecution of Sex Crimes at the International Crimes Tribunal, Bangladesh*. Conference on Thematic Investigation and Prosecution of International Sex Crimes, FICHL, 7-8 March, Cape Town 2011.
[165] Article 12, Rome Statute.

which the crimes were committed is not a party to the Rome Statute.[166] The power of the Security Council over ICC personal jurisdiction is further exaggerated by its power to defer cases ordinarily within ICC jurisdiction for rolling 12-month periods that may be, if the view of the Security Council continues, renewed each year.[167] This allows the Security Council the power to grant jurisdiction to the court where the Council views prosecution as serving its interests and to block ICC jurisdiction where prosecution confronts those interests.

The ICC may also refrain from exercising jurisdiction over persons if States demonstrate they are able and willing to try persons for crimes committed. The criteria provided to states relating to 'capacity' and 'willingness' is ambiguous. The State is deemed to be 'unwilling' if the person is being shielded from ICC prosecution by proceedings, if there is unjust delay, or proceedings are not independent or impartial.[168] A State is determined to be unable if there has been a total or substantial collapse of its national judicial system.[169] This chapter will examine the many methods available to States to manipulate international or internationalized criminal justice processes – methods also available to States attempting to shape local processes to meet the capacity and willingness threshold. The examination of both design and cooperative methods thus illustrates how the absence of technical specificity in the above stated threshold, facilitates State use of sophisticated manipulative methods not easily identified by non-policy makers.

[166] Ibid., Article 13(b).
[167] Ibid., Article 16
[168] Ibid., Article 17.
[169] Ibid.

A prosecutor's interpretation of a complementarity threshold may be informed by express or implicit threats from powerful states. These may include threats to undermine court processes by refusing to cooperate with the court, actively impeding the court or pressuring other States to do the same. For example, the US originally adopted a policy of non-cooperation and active obstruction towards the ICC. President Bush's Undersecretary for Arms Control and International Security (UACIS), John Bolton, led policy towards the ICC. His position was made clear in his testimony to the Senate Foreign Relations Committee after the signing of the Rome Statute. In this he stated:

"Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor and that is the real problem of universal jurisdiction."[170]

Bolton advised that the US adopt the following policy towards the ICC:

"I call it 'the Three Noes': no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective. The ICC is fundamentally a bad idea. It cannot be improved by technical fixes as the years pass, and in fact it is more likely than not to worsen."[171]

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[170] US Senate, Subcommittee on International Operations, Committee on Foreign Relations. *Is a UN International Criminal Court in the US National Interest?* S. HRG. 105-724, 23 July 1998.
[171] Ibid.

As UACIS, Bolton made similar Statements regarding the US's position in 2002 and 2003[172] at a time the ICC was in its infancy. This position materialized in a number of ways. First, the US sought Article 98 Agreements with many States Parties which obligated those States to hand over US persons to US custody rather than to the ICC. Secondly, the US passed the American Service members' Protection Act (ASPA). The ASPA restricts US cooperation with the ICC and with States parties unless 'in the US interest', requires US personnel impunity for US peacekeeping support, and allows the President to use 'any means necessary' to free US citizens and allies from ICC custody.[173] As the world's hyper-power, the US wields tremendous economic and security leverage over many States, particularly those experiencing international crimes. One may conclude that the ICC Prosecutor may be cognizant of US capacity to undermine the court, a cognition that may effect case selection.

The case of Darfur (Sudan) was critical in shifting US policy towards the ICC. In 2005 the US stated its preference of a Special, ad-hoc or otherwise UN/AU tribunal.[174] After failing to persuade the Security Council to pursue an ad-hoc court rather than Security Council referral to the ICC, the US position softened. The softening took the form of policy revision that allowed active cooperation where ICC case selection and US interests are congruent. However, the threat of non-cooperation persists were the ICC to employ case

[172] John Bolton. *The United States and the International Criminal Court: Remarks to the Federalist Society*. Washington DC, 14 November 14 2002; John Bolton. *American Justice and the International Criminal Court: Remarks at the American Enterprise Institute.* Washington DC, 3 November 2003.
[173] Sections 2004, 2005, 2006, 2007, and 2008 ASPA (2002), H.R.4775, One Hundred Seventh Congress.
[174] US Department of State, Daily Press Briefing, Richard Boucher (spokesman), Washington, DC, 1 February 2005.

selection not viewed by the US as 'responsible'.[175] A prosecutor might favor US friendly States in interpreting complementarity because of a perceived implicit threat from the US or States of essential strategic importance to other P5 members. Complementarity is the concept in which the ICC cedes primacy of jurisdiction to States that are able and willing to prosecute crimes domestically.[176] Wide discretion relating to the interpretation of complementarity (a lack of 'precision' as to the law) would allow the prosecutor the legal space to make such a decision.

One example of unclear prosecutorial discretion over complementarity is Colombia. Criminal proceedings in Colombia allow for offenders to provide insignificant information relating to crimes committed by their unit in order to procure amnesty.[177] The prosecution has also refrained from targeting senior leadership personnel or adopting seniority as criteria for selecting crimes.[178] However, Colombia has long been an ally of the US. The US may view an indictment of any high-ranking Colombian official as hostile to its interests given the breach of Colombian sovereignty and diplomatic stigma attached to a

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[175] In 2006, US Department of State Legal Adviser John Bellinger, while insisting the Bush administration will never allow Americans to be tried by the court stated, "we do acknowledge that it has a role to play in the overall system of international justice." In a May speech, Mr. Bellinger said "divisiveness over the ICC distracts from our ability to pursue these common goals" of fighting genocide and crimes against humanity: Jess Bravin. "U.S. Warms to Hague Tribunal: New stance reflects desire to use Court to prosecute Darfur crimes," *The Wall Street Journal,* 14 June 2006;
That same year, Republican Senator, John McCain and former Senator and presidential candidate, Bob Dole, stated in an op-ed: "U.S. and allied intelligence assets, including satellite technology, should be dedicated to record any atrocities that occur in Darfur so that future prosecutions can take place. We should publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks on civilians," John McCain and Bob Dole. "Rescue Darfur Now," *The Washington Post*, 10 September 2006.
[176] Article 17 Rome Statute.
[177] Jennifer Easterday, "Deciding the Fate of Complementarity: A Colombian Case Study." *Arizona Journal of International & Comparative Law* 26(1) (2009), 49-111, 73.
[178] Maria Saffon, "Problematic selection and lack of prioritization: the Colombian experience," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 99.

US ally under such circumstances. Is an ICC prosecutor immune to any cognizance of the potential political consequences of ICC case selection in circumstances that may solicit obstruction from powerful States? The ICC's continuing policy of non-engagement in Colombia may suggest that, according to Keohane et al.,[179] the ICC is not willing to settle disputes against the interests of powerful States as a key indicator of its 'non-transnational' status, or for the purposes of this study, an indicator of its weak case selection independence.

2.2.2 Jurisdiction over Crimes

The crimes that a court is granted jurisdiction over may exclude or include the selection of some perpetrators or groups for prosecution, but not others. Repeated provision of jurisdiction over some crimes but not others may also prompt norms of court jurisdiction to emerge that exclude some international crimes from prosecution but preference others. Preferencing the prosecution of some crimes but not others may provide a strategic military advantage to States that commit and may wish to commit some crimes but not others. The extent to which crimes are *jus cogens* demonstrates the extent to which they constitute hard law or highest 'obligation' for State compliance.[180]

Jurisdiction over crimes has been particularly instructive in case selection at the ICTR. The scale of criminality before the ICTR is so great that it has been estimated that perpetrators could number as many as one million.[181] Prosecutors have undertaken a strategy of adopting the most serious cases only and transferring those remaining to national

[179] Keohane et al. 2000.
[180] Abbott et al. 2000, 402-4.
[181] Obote-Odora 2009.

jurisdictions.[182] In 2004, the ICTR reassessed its case selection in the context of Security Council Resolution 1503 (2003). The Rwandan government had ceased to cooperate with the ICTR, bringing proceedings to an effective standstill. Under these circumstances, the ICTR prosecutor Carla del Ponte, who had begun investigations into alleged killing of 25,000-30,000 Hutu civilians by the governing Rwandan Patriotic Front (RPF), was replaced.[183] Resolution 1503 urged the ICTR to formalize a detailed strategy of transferring cases involving intermediate and lower-rank accused to competent national jurisdictions, including Rwanda. The Security Council's rationale was the hastening of investigations' conclusion by 2004 and cases by 2010.[184] The revised case selection strategy of the ICTR caused cessation of investigations into RPF personnel by focusing on what a new prosecutor considered 'serious violations'.[185] Prioritizing genocide cases over other violations of international humanitarian law, which were transferred to Rwandan courts, constituted the revised 'serious violations' threshold, despite crimes other than genocide being placed within the ICTR's mandate.[186] The prosecution did not cite any justification for referring war crimes and crimes against humanity cases but not genocide, despite the equal capacity of the Rwandan courts to try those crimes.[187] The prosecution has defended this position by citing genocide as 'the crime of all crimes' and therefore of

[182] Ibid.
[183] UN Security Council. 29 July 2003. Letter dated 28 July 2003 from the Secretary-General addressed to the President of the Security Council S/2003/766; Del Ponte 2009; Lars Waldorf. "Transitional Justice: War Crimes Tribunals and establishing the rule of law in post-conflict countries: A mere pretence of justice: Complementarity, sham trials, and victor's justice at the Rwanda Tribunal," *Fordham International Law Journal* 33 (2010), 1221-1277, 1221.
[184] UN Security Council, *United Nations Security Council. Resolution 1503*, 28 August 2003, S/RES/1503.
[185] Hassan Jallow, "Prosecutorial Discretion and International Criminal Justice," *Journal of International Criminal Justice* (2005) 3(1): 145-161, 151.
[186] The potential to transfer cases was cited as a consideration by the prosecution. Ibid, 152-3.
[187] Ibid., 152-3.

greater 'seriousness' than other war crimes or crimes against humanity.[188] The prosecution does not address prioritizing selection of genocide cases of far less numeric gravity than war crimes or crimes against humanity cases.

Another example of exclusion of an international crime that excludes parties to a conflict from prosecution is the crime of aggression. The court last empowered to prosecute the crime of aggression was the International Military Tribunal for the Far East in 1946. Were the ICC prosecutor to have held *proprio moto* jurisdiction over aggression, it might have been able to construct a *prima facie* case against the UK, a party to the Rome Statute, for its March 2003 invasion of Iraq. Similarly, cases may have been constructed against Charles Taylor for waging war against Sierra Leone, or NATO forces in Yugoslavia, were the Special Court or the ICTY respectively to have been so endowed. Under contemporary interpretations, Charles Taylor's alleged initial support of rebels in Sierra Leone would not constitute aggression because of the absence of State action (Taylor was at the time launching war against Liberian President Samuel Doe). However, argument for the expansion of the definition of aggression, both relating to impugned acts and who can be prosecuted for them, would hold accountable the act of indirect aggression - financial, military or other material support of actors waging war against a sovereign territory.[189] Mark Drumble argues that criminalizing indirect aggression would better equip courts to protect human rights, promote stability, protect legitimate sovereignty, and foster security from the diversity of threats that confront the contemporary world.[190]

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[188] Obote-Odora 2009.
[189] Mark Drumble. "The push to criminalize aggression: Something lost amid the gains?," *Case Western Reserve Journal of International Law* 41(2009) 291-319.
[190] Ibid.

States Parties to the ICC did not seriously consider such bold approaches for adoption.[191] The Assembly of States Parties (ASP) adopted the definition proposed by the Special Working Group on Aggression that the ASP had set up. This definition adopted and slightly narrowed the two key elements of State character and command responsibility. It first requires that the act be by a State against the territory of another State and of character, gravity, or scale that violates the UN Charter. Secondly, it requires that the perpetrator was aware of the violating factual circumstances and exercised effective control over the political or military action of the State.[192]

Negotiations over the inclusion of the crime of aggression were dominated by the insistence of some P5 members, that it control jurisdiction. ICC vice president, Hans-Peter Kaul, has stated:

"It seems quite obvious that certain States, powerful States, continue to reserve for them, openly or more discreetly, also as some kind of hidden agenda, the option to go to war for their interests."[193]

Powerful States sought the exclusion of the crime of aggression completely, by specifically excluding its definition and qualification providing Security Council control.[194] After the signing of the Rome Statute, the US, for example, announced its intent not to participate

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[191] Kai Ambos. "The Crime of Aggression after Kampala," *German Yearbook of International Law* 53 (2010), 463-509.

[192] Ibid., 471.

[193] Hans-Peter Kaul, "Is it Possible to Prevent or Punish Future Aggressive War-Making?," FICHL Occasional Paper Series, Torkel Opsahl Academic EPublisher. 1 Oslo, 2011.

[194] David Scheffer, "The United States and the International Criminal Court," *The American Journal of International Law*, 93 (1) (1999) 12-22, 13.

and to actively discourage other States from ratifying the Rome Statute.[195] The provision of Security Council control over ICC jurisdiction relating to aggression was provided at the ICC review conference in 2010. Security Council authorization is the only way the ICC can assert jurisdiction over a non-State Party or a non-consenting State Party.[196] Although the definition of the crime has been adopted, ICC jurisdiction over aggression cannot commence until after 1 January 2017, and after thirty States Parties have ratified the amendment. As a result, P5 members will be enabled to block prosecution of the crime of aggression, once it enters into force.

Present among the P5 are those States with the greatest military capacity. Enforcing international humanitarian law reinforces the predominance of those States' conventional military superiority. Criminalizing weak or failed States' use of terrorist or other illegal methods of warfare, removes one of the few, albeit unsavory strategies, available to weak States to counter powerful States' military superiority. This assists powerful States to assert their dominance and entrench their position in the global order. Exercising control over the prosecution of aggression allows powerful States to utilize their strategic military advantage to illegally invade weaker States with impunity, while enjoying the benefits of international humanitarian law.

Perhaps the most disproportionate use of internationalized jurisdiction over crimes has occurred at the Special Tribunal for Lebanon (STL). The STL holds jurisdiction over

[195] Marcella David, "Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law," *Michigan Journal of International Law* 20 (1998-1999) 337-412, 337.
[196] Ambos 2010.

"persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons."[197] The STL will have jurisdiction only over other attacks between 1 October 2004 and 12 December 2004 if they are connected, of a similar nature and gravity and are approved by the Security Council, the UN Secretary General and the Government of Lebanon.[198] The creation of the STL followed a UN investigation that implicated Syrian officials in the crime.[199] The court focuses on these crimes only, despite the highly relevant fact that Lebanon suffered a fifteen-year civil war beginning in 1975.

2.2.3 Geographic/Territorial Jurisdiction

The limitation of jurisdiction to particular States or territories is also a jurisdictional instrument of 'delegation' that can direct case selection at some parties to a conflict, but not others. The ICTY had its jurisdiction limited to the 'territory of Yugoslavia'.[200] This encompassed all the main parties to the conflict. However, the ICTR was granted territorial jurisdiction, within the temporal jurisdiction, over both Rwanda and neighboring States where Rwandan citizens committed violations.[201] This provided jurisdiction over connected crimes, particularly in the Eastern part of the Democratic Republic of Congo (DRC), but did not provide jurisdiction over associated or unassociated crimes committed by Congolese, Ugandan, or other nationals within the temporal mandate (the calendar year of 1994). The combined use of territorial, temporal, and personal jurisdiction also

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[197] UN Security Council. *Statute of the Special Tribunal for Lebanon, Attachment to Security Council Resolution 1757,* 30 May 2007, S/RES/1757.
[198] Ibid.
[199] Detlev Mehlis. *Second Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolutions 1595 and 1636 (2005)*, 10 December 2005.
[200] UN Security Council, *Security Council Resolution 837*, 25 May 1993, S/RES/827.
[201] ICTR Statute.

precluded the prosecution of crimes committed by RPF personnel within the DRC after 1994. Although part of a larger regional conflict, the ICTR was precluded from focusing on crimes committed by forces other than those fighting against the RPF.

Armed conflicts in which international crimes occur rarely respect state borders. Territorial limitations, therefore, can have severe case selection consequences. In the case of the Special Court for Sierra Leone, the crimes within the court's jurisdiction were limited to those that took place within the territory of Sierra Leone.[202] The combination of territorial limitation and the absence of personal limitation, other than those discussed above, provided jurisdiction to external supporters of the Revolutionary United Front (RUF) in Sierra Leone. It did not provide jurisdiction over those supporting other armed groups outside Sierra Leone's territory despite their role in a regional conflict. The indictment of Liberian President Charles Taylor instructs the regional nature of the conflict. The court alleges that the RUF were ordered to invade Sierra Leone by Taylor in 1991 along with members of his armed group, the Liberian National Patriotic Front (NPFL). However, limiting the territorial jurisdiction of the court restrained it from prosecuting crimes committed in the regional conflict in Liberia or Guinea, and arguably Cote d'Ivoire.[203] During the war, RUF and NPFL forces fought in Guinea. Towards the conclusion of the conflict a Guinean backed force, Liberians United for Reconciliation and Democracy (LURD), waged war on Liberia undermining Taylor's capacity to support the RUF. A similar Cote d'Ivoire supported force, LURD-MODEL, attacked Taylor from Liberia's southeast. Crimes committed by these forces are excluded by the Court's territorial

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[202] SCSL Statute.
[203] For an enhanced examination of these regional dynamics see Chapter 4: 'Judd's War: How a US shift in policy created the Special Court for Sierra Leone and drove its case selection.'

jurisdiction. This excludes from the court's jurisdiction; the late President of Guinea, Lansana Conte, and any other supporters of the LURD or the LURD-MODEL.

The Extraordinary Chambers in the Courts of Cambodia (ECCC), an internationalized court like the SCSL, was also granted jurisdiction over crimes committed on Cambodian territory only.[204] Like the conflict in West Africa's Mano River region, Cambodia's conflict formed part of a larger regional conflict involving global geo-politics.

2.2.4 The Constraints of Temporal Jurisdiction

Temporal constraint is a further example of jurisdictional delegation. Case selection at the SCSL was also restricted by its temporal mandate. The court was not granted jurisdiction over crimes committed before 30 November 1996,[205] the time at which the Abidjan Peace Accord was signed. The war had begun in 1991. The temporal jurisdiction of the court excluded from prosecution crimes committed by the National Provisional Ruling Council that took power in a coup in 1992 and committed numerous abuses until it lost power in elections in 1996. Its leader, Valentine Strasser was provided asylum in the UK. The UK was also one of the Court's designers.

Similarly, the law establishing the ECCC provides jurisdiction over crimes committed in that State between 17 April 1975 and 6 January 1979.[206] This temporal constraint on

[204] Article 1, 2, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006) 6 June 2003.
[205] SCSL Statute.
[206] Article 1, 2, Law on the Establishment of the ECCC, 27 October 2004.

delegation excludes alleged crimes committed by Vietnamese and US forces in 1969 and 1973, and some crimes by Cambodian forces.[207]

The conflict in the DRC has commonly been cited as a permutation of the 1994 Rwandan genocide, or at least inextricably linked to it.[208] The temporal jurisdiction of the ICTR has excluded crimes committed by Rwandans in eastern DRC after 31 December 1994.[209] The exclusion includes crimes committed by elements of forces linked to the genocidaires or the RPF.[210] When combined with personal jurisdiction restricted to Rwandan citizens in neighboring territories, the ICTR provides amnesty to all Congolese, Ugandans, Burundians and other non-Rwandans for crimes committed during and after 1994 on their territories.

Jurisdiction over a large part of the conflict in the DRC is also excluded by the temporal jurisdiction of the ICC. It has a temporal scope limited only by its absence of retroactivity.[211] The court asserts jurisdiction over states' territories and citizens at the time that those states ratify the Rome Statute.[212] This excludes therefore, many of the crimes committed after the conflict in the DRC began. It focuses the court on contemporary criminality in conflicts that began long before the courts temporal jurisdiction began. This

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[207] William Shawcross. *Sideshow: Kissinger, Nixon and the destruction of Cambodia*. United States: Touchstone, 1987.
[208] Gerard Prunier. *Africa's World War: Congo, the Rwandan genocide, and the making of a continental catastrophe.* New York: Oxford University Press, 2008; Phil Clark, "Ethnicity, Leadership and Conflict Mediation in eastern Democratic Republic of Congo: The case of the Barza Inter-Communautaire," *Journal of East African Studies* 2(1) (2008), 1-17.
[209] ICTR Statute.
[210] 'Genocidaire' is a civilian, military or militia member that participated in the genocide. It includes the Interahamwe - a Hutu paramilitary militia.
[211] Article 11, Rome Statute.
[212] Ibid., Article 11-12.

is the case in the DRC, as stated, but also in Uganda where alleged crimes emanate from a conflict that began in 1986. The ICC's tendency towards contemporary conflict, as instructed by its temporal mandate, causes it to confront less settled and less certain security and political dynamics in investigating and prosecuting crimes within its mandate. As we shall see later in this chapter, the temporal proximity of the offending may be very influential for consistency of cooperation on the part of States, illuminating the interaction of many of the elements of case selection independence.

2.2.5 Access

Institutional 'access' refers to the breadth of actors that may prompt an institution to become seized of a matter and who may submit a claim to a tribunal.[213] It is one of the pillars of delegation cited by Keohane et al.[214] The role of non-State actor access to adjudicatory institutions and State policy makers demarcates the 'access' provided to a court by its designing actors.[215] International courts and tribunals, until the ICC, had limited the power to trigger an investigation (by creating a court) to the Security Council or the Security Council in cooperation with a host government. All states that have ratified the Rome Statute subject their nationals, and persons acting on their territory, to the jurisdiction of the Court.[216] That jurisdiction may be triggered by the Prosecutor's own initiative (*proprio motu*), by the referral of a situation by a State party to the Rome Statute, or by a referral of the Security Council of the UN.[217]

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[213] Keohane et al. 2000, 462-5.
[214] Ibid.
[215] Abbott and Snidal 2000, 432, 451; Ibid.
[216] Article 12, Rome Statute.
[217] Ibid., Article 12-15.

The Security Council may also refer jurisdiction over a situation to the ICC even if the State in which the crimes were committed or the State to which the alleged perpetrator is a national, is not a party to the Rome Statute.[218] The power of the Security Council over ICC personal jurisdiction is further exaggerated by its power to defer cases ordinarily within ICC jurisdiction for rolling twelve-month periods that may be, if the view of the Security Council continues, renewed each year.[219] This allows the Security Council the power to grant jurisdiction to the court where the Council views prosecution as serving its interests and to block ICC jurisdiction where prosecution confronts those interests. The ICC has expanded access in the sense that any actor with information relating to crimes within the courts jurisdiction may trigger *proprio motu* jurisdiction by providing that information to the prosecutor. This is a significant departure from the ad-hoc and hybrid tribunals and courts in that it provides access to those other than States at the Security Council and host States cooperating with it. The Rome Statute also makes an advancement in that it distributes the power commonly reserved for the Security Council to select when a court should be created or seized of crimes to States prepared to sign and ratify the Rome Statute. That allows those States the power previously solely held by the Security Council to shape the jurisdictional elements described above. However, the power of *proprio motu* and State referral is constrained by the Security Council power to defer cases ordinarily within ICC jurisdiction for rolling twelve-month periods that may be, if the view of the Security Council continues, renewed each year.[220] This allows the Security Council the power to grant jurisdiction to the court where the Council views prosecution as serving its interests and to block ICC jurisdiction where those interests are confronted. Unlike the

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[218] Ibid., Article 13(b).
[219] Ibid., Article 16.
[220] Ibid., Article 16.

European Court of Human Rights, no international criminal court or tribunal has been established that allows for domestic cases to access international courts by way of appeal.

2.2.6 Case selection criteria: Gravity, Seniority, and other modes of prioritization

The apparent 'hard law' or *jus cogens* 'obligation' and 'precision' status applied to international crimes before international courts by Abbott et al is not consistent with its sparse and diverse application of selection criteria.[221] Capacity – financial, human and infrastructural - is insufficient to prosecute all international crimes cases. The principle of 'legality' requires that every case of criminality supported by sufficient evidence be brought to court.[222] Where this is not possible due to an inadequate criminal justice apparatus, the 'opportunity' principle lends discretion to the prosecutor to decide which cases should be prosecuted and which should not.[223] States, therefore, may wield power over case selection by incorporating prosecution case selection criteria into a court's design. However, where they do not, prosecutors retain discretion to do so, or in the case of some international crimes cases, to refrain, allowing imprecision, arbitrary prosecutorial discretion, and greater scope for State influence through calculated levels of cooperation.[224] The impartiality and legitimacy of criteria is therefore instructive as to the

[221] Abbott et al. 2000, 405-6.
[222] Anne van Aaken et al., "The Prosecution of Public Figures and the Separation of Powers: Confusion within the executive branch," *German Working Papers in Law and Economics* 11 (2003) 12.
[223] Ibid.
[224] Examples of proceedings where criteria has not been set forth by prosecution include the SCSL and prosecution of cases of crimes against humanity in Argentina, Columbia, Serbia and Croatia. See: Mirna Goransky, "(The lack of) Criteria for the Selection of Crimes Against Humanity Cases: the experience of Argentina," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 68-9, 75; Maria Saffon, "Problematic selection and lack of clear prioritization: the Colombian experience," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 99; Vesna Terselic, "Criteria for Prioritising and Selecting Core International Crimes Cases: the situation in Croatia," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 103; Natasa Kandic, "The Republic of Serbia Office of the War Crimes Prosecutor has no

independence of prosecution case selection.[225] The criteria's impartiality is derived from its certainty, predictability and systematic nature that are clearly laid out to victims and other stakeholders so they may challenge perceived incidence of non-application.[226] Transparent and efficient criteria bind prosecutors, thereby protecting them against unwanted external pressures. They also drive more efficient use of resources via the requirement of effective planning prior to commencement of investigation.[227]

Where prosecutors depart from criteria, the judiciary may step in to clarify, formalize and entrench case selection criteria.[228] The judiciary is not empowered to throw out a case on the basis of non-application of case selection criteria but rather to simply assess whether a *prima facie* case exits.[229] However, the judiciary has stepped in, as in the case of the ICTY in 1995, to review general case selection policy they viewed as to closely oriented toward availability of evidence and personal prosecutorial interest.[230] The obligation of the prosecution to rigidly apply criteria was reaffirmed by the ICTY in the Celebici case where the Appeals Chamber cited the defendant's right to equality before the law.[231] It is for the

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Strategy for Prosecuting War Crimes" in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 113.

[225] Bergsmo 2009, 19.

[226] Ahmed and Day 2009, 100.

[227] Richard Dicker, "Making Justice Meaningful for Victims," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 187; Mirsad Tokaca, "Some Introductory Remarks on the Characteristics of Effective Criteria for the Prioritization of Core International Crimes Cases," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 140.

[228] Ilia Utmelidze, "The Time and Resources Required by Criminal Justice for Atrocities and De Facto Capacity to Process Large Backlogs of Core International Crimes Cases: the limits of prosecutorial discretion and independence," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 136.

[229] Claudia Angermaier, "Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 30.

[230] Ibid, 31.

[231] *Prosecutor v. Mučić et al.,* ICTY Appeals Chamber Judgement, IT-96-21, 20 February 2001, para. 608-14.

defence, therefore, to show that the prosecution held an "unlawful or improper (including discriminatory) motive"; and that "other similarly situated persons were not prosecuted".[232]

The legitimacy of international crimes trials are also informed not only by whom they are endowed to prosecute, but also by whom they select to prosecute within their mandate. Margaret de Guzman cites the discrepancy of an audience's interpretation as to how independent case selection is weighed. De Guzman cites case selection upon a crime's gravity as bearing legitimacy for some audiences while others may require prosecution of all parties to a conflict that committed abuses.[233] The role of criteria application is two fold according to de Guzman. It is firstly sociological - what people think is legally or morally legitimate, and secondly normative – what really is legally or morally legitimate.[234] This section is primarily concerned with the normative question but also queries sociological legitimacy of prosecutors' discretionary application of criteria in case selection.

2.2.6.1 Gravity

Gravity has emerged as a prominent normative criterion for selecting international crimes cases.[235] The gravity of crimes was a theme considered by the Ad Hoc Committee on the Establishment of an ICC.[236] Much of the discretion residing in the prosecution depends on

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[232] Ibid, para. 608-14.
[233] Margaret DeGuzman, "Gravity and the Legitimacy of the International Criminal Court," *Fordham International Law Journal*, Vol. 32, 2009.
[234] Ibid, 1428.
[235] Article 53(1)(c), 17(1)(d) Rome Statute; Zekerija Mujkanović, "The Orientation Criteria document in Bosnia and Herzegovina," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 65.
[236] International Law Commission, *Summary Record of the 2330th Meeting*, ¶ 9, U.N. Doc. A/CN.4/SR.2330 (1994), *reprinted in* [1994] 1 Y.B. Int'l L. Comm'n 7, 9, U.N. Doc. A/CN.4/SER.A/1994; Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an*

how they evaluate gravity. Gravity or a 'serious violation' was first evaluated by the ICTY in its 1995 criteria. The instructing elements included: Number of victims; nature of acts; area of destruction; duration and repetition of the offence; location of the crime; linkage to other cases; nationality of perpetrators/victims; arrest potential; evidence/witness availability; showcase or pattern crime; and media/government/NGO target.[237]

The inclusion of the element of arrest-potential lends case selection influence to States seeking to deter a particular indictment by demonstrating pre-emptive unwillingness to hand over suspects (an element of cooperation). In adjudicating the element of gravity when referring cases to national jurisdictions, the ICTY considered the number of victims, the crime's duration, as well as the geographic scope.[238]

The gravity criteria has been developed by the ICC prosecutor's 2006 policy paper by citing key criteria:

1. The number of victims;
2. Possible geographic and temporal intensity;
3. The nature of the crime;
4. The manner of the crime (including particular cruelty);
5. Victim vulnerability;
6. Abuse of authority and;

International Criminal Court, 50 U.N. GAOR Supp. (No. 22), ¶ 81, U.N. Doc A/50/22 (Sept. 6, 1995) [hereinafter *Report of the Ad Hoc Comm.*].

[237] Angermaier 2009, 32.

[238] *Prosecutor v. Željko Mejakic et al.,* ICTY Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis.,* IT-02-65-PT, Referral Bench, 20 July 2005, para. 21; *Prosecutor v. Gojko Janković,* ICTY Decision on Referral of Case under Rule 11*bis.* (With Confidential Annex), IT-96-23/2-PT, Referral Bench, 22 July 2005, para 19.

7. The impact of the crime.[239]

The 2006 policy paper, states that the prosecution will not attempt to attribute specific weights or scientific application of the variables, but rather "a craft, based on guiding principles but sufficiently flexible to address the infinite variety of factual scenarios".[240]

The prosecution has highlighted the crimes of killing and rape as among those of utmost gravity.[241] However, its initial indictment of a Congolese national, Thomas Lubanga, was for recruitment of child soldiers.[242] The availability of Lubanga, then in the custody of the Congolese government, has been cited as justification for his indictment on narrow and hastily compiled charges.[243] The prosecutor had asserted that the situations in the Congo and Uganda constituted the "gravest admissible situations under the jurisdiction of the Court,"[244] but did not select the gravest Congolese episodes of criminality for prosecution. In the Ugandan situation, the prosecutor specifically cited the crimes committed by the Lord's Resistance Army (LRA) as being "much more numerous and of much higher gravity" than those committed by the Ugandan People's Defence Forces (UPDF).[245] The ICC prosecution had, however, been negotiating with the head of the UDPF, Ugandan

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[239] Paul Seils, "The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 57. Seils refers to a public statement by the prosecution which cited the scale of "the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes" as constituting gravity: ICC - Office of the Prosecutor (OTP). *Report on Prosecutorial Strategy*, 14 September 2006, The Hague, 5.
[240] Ibid.
[241] Ibid.
[242] *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of arrest, ICC Pre-trial Chamber I, ICC-01/04-01/06, 10 February 2006.
[243] Seils 2009, 57-8.
[244] ICC -OTP. *Report on the Activities Performed During the First Three Years (June 2003-June 2006),* 12 September 2006, 6-7
[245] Luis Moreno-Ocampo. *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*. 14 October 2005, The Hague, 2 – 3.

President, Yoweri Museveni, for months prior to Museveni's referral of the situation to the ICC.[246] This caused many observers, particularly Ugandans, to perceive that a deal had been forged, which excluded the UPDF from the prosecution's case selection radar.[247]

Another contentious ICC interpretation is that of the security 'impact' of alleged killings of peacekeepers in Darfur.[248] Prominent commentators have cited the indictments as driven by inaccurate western historical narratives of the conflict.[249] In the case of crimes committed by British soldiers in Iraq, the prosecutor, in that instance, cited gravity as justification for non-prosecution.[250] The 'impact' justification might well have been applied to this episode. The extent, to which the threat of British non-cooperation with any ICC prosecution of UK nationals instructed restraint from pursuing the case, remains unclear.

Perhaps even more concerning is the speculative nature of 'impact' considerations, a weakness conceded by former ICC prosecution data analyst, Paul Seils.[251] An 'impact' variable could be interpreted to match politically informed case selection, were a prosecutor to be so inclined. The Appeals chamber has stated that for the court to reject jurisdiction, "the inception and the consequences of the crime must be negligible."[252] The

[246] Phil Clark, "Chasing Cases: The ICC and the politics of state referral in the Democratic Republic of Congo and Uganda," in Carsten Stahn (ed.) *The International Criminal Court and Complementarity: From Theory to Practice.* Cambridge: Cambridge University Press, 2010.
[247] Ibid.
[248] Seils 2009, 58-9.
[249] Mamdani 2009.
[250] ICC-OTP. *Letter Concerning Situation in Iraq,* 9 February 2006.
[251] Seils 2009, 59.
[252] *Prosecutor v. Lubango Dyilo*, ICC-01/04, 13 July 2006 (Pikis, J, separate and partly Dissenting), 40.

prosecutor has requested clarification from States parties to the Rome Statute as to whether he should select the most "grave and urgent situations based on gravity."[253]

A more exhaustive set of criteria is being contemplated at the Khmer Rouge Tribunal where the severity, scope and systematic nature of crimes are anticipated to provide instructing considerations.[254] This includes considering crimes that include those most illustrative of crimes during the mandated period, those with the greatest number of victims, geographical impact and, the 'proportional magnitude of crimes inflicted upon specific sectors of the population'.[255] This interpretation of gravity provides the least scope for State manipulation.

2.2.6.2 Other Considerations

The inclusion of 'policy considerations', 'practical considerations' and 'other considerations' in published ICTY case selection criteria, provide perhaps the least 'precision' and greatest scope for States to manipulate case selection through cooperation. The ICTY's considerations included:

- advancement of international jurisprudence (reinforcement of existing norms, building precedent, clarifying and advancing the scope of existing protections);
- willingness and ability of national courts to prosecute the alleged perpetrator;
- potential symbolic or deterrent value of prosecution;
- public perception concerning the effective functioning of Tribunal;

[253] Luis Moreno-Ocampo. *Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs.* 24 October 2005, 6.
[254] Ahmed and Day 2009.
[255] Ibid.

- public perception concerning immediate response to on-going atrocities;
- public perception concerning impartiality/balance; available investigative resources;
- impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready;
- the estimated time to complete the investigation;
- timing of the investigation (for example, the impact initiating a particular investigation will have on the ability to conduct future investigations in the country);
- possibility or likelihood of arrest of the alleged perpetrator; consideration of other work carried out in relation to the case (including a check against Rules of Road cases);
- completeness of evidence;
- availability of exculpatory information and evidence;
- consideration of other OTP investigations in the same geographical area, particularly those of “opposite ethnicity” perpetrators and victims;
- the particular statutory offence or parts thereof, that can be charged;
- the charging theories available;
- potential legal impediments to prosecution;
- potential defences;
- theory of liability and legal framework of each potential suspect;
- the extent to which the crime base fits in with current investigations and overall strategic direction;

- the extent to which a successful investigation/prosecution of the case would further the strategic aims;
- the extent to which the case can take the investigation to higher political, military, police and civil chains of command and;
- to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.[256]

Many of these case selection considerations, particularly those relating to availability of evidence, allow the prosecutor to select or refrain from selecting cases based on political considerations, mostly relating to State cooperation. The ICTR's consideration of no reasonable prospect of conviction based on the availability of witnesses, their competence and credibility as well any potential differences, leaves it particularly vulnerable to Rwandan State interference with many witnesses residing on Rwandan territory.[257] These concerns have been further refined by the ICC's 'interests of justice' threshold.[258] To interpret 'the interests of justice', the prosecution cites 'practical realities', including witness security and access,[259] as well as the feasibility of conducting an effective investigation in a particular territory.[260] He has also stated that "all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community" need to be considered before

[256] Angermaier 2009, 32-3.
[257] Obote-Odora 2009, 45-47, 52.
[258] Article 17, 53 Rome Statute.
[259] Seils 2009, 55.
[260] ICC-OTP. *Annex to the Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications,* September 2003, 1.

launching an investigation.[261] In an apparent contradiction of this position, the prosecution has excluded the consideration of international peace and security concerns in selecting cases.[262] That calculation is instead located in the Security Council's discretion to defer a situation, as provided for in the Rome Statute, a position Human Rights Watch (HRW) has chosen to emphasize.[263] Recognition that the necessary assistance from the international community be available as a consideration, citing in particular the 'arrest of suspects', indicates the prosecution's perception that anticipated State cooperation may be necessary for an investigation to be launched.[264]

2.2.6.3 Seniority

Trends are slowly emerging as to which crimes should be prioritized as well as which persons. The norm of prioritizing those with command responsibility was established at the ICTY. The Security Council had directed the prosecution to "immediately target the military and political leaders or other high ranking commanders, based on the notion of command responsibility".[265] The court's first prosecutor, Richard Goldstone, initially ignored this instruction.[266] Adopted criteria targeting those with command or other superior responsibility irrespective of official capacity, has since become entrenched as a norm of prioritizing case selection known as those bearing 'greatest responsibility'.[267] At

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[261] ICC-OTP. *Paper on Some Policy Issues Before the Office of the Prosecutor*, September 2003, 2.
[262] Ibid 1, 8-9.
[263] Article 16 Rome Statute; HRW*, Courting history: The landmark International Criminal Court's first years*. July 2008.
[264] ICC-OTP, September 2007.
[265] Antonio Cassese, "The ICTY: A living and vital reality," *Journal of International Criminal Justice,* 2 (2004) 585-597, 586.
[266] Ibid.
[267] See for example: Seils 2009, 55; Art 27 and 28 Rome Statute; Mujkanović 2009; Ahmed and Day 2009.

the ICTY in 1995, the following elements were provided as stated considerations when evaluating command responsibility:

- position in hierarchy under investigation;
- political, military, paramilitary or civilian leader;
- leadership at municipal, regional or national level;
- nationality;
- role/participation in policy/strategy decisions;
- personal culpability for specific atrocities;
- notoriousness/responsibility for particularly heinous acts;
- extent of direct participation in the alleged incidents;
- authority and control exercised by the suspects; the suspect's alleged notice and knowledge of acts by subordinates;
- arrest potential;
- evidence/witness availability;
- media/government/NGO target and;
- potential roll-over witness/likelihood of linkage evidence.[268]

Any one of these elements could be emphasized at the expense of others in order to justify the targeting of particular individuals. The absence of 'precision' as to which criteria should be employed, whether there is a hierarchy of criteria, and its inconsistent application or employment from Court to Court, undermines the 'obligation' of States to

[268] Angermaier 2009, 31-2.

provide particular criteria when designing courts, or of prosecutors to employ particular criteria when selecting cases.

States may seek to influence prioritized elements by issuing public or private statements or by attempting to drive media coverage that disproportionately focuses on individuals or elements of crimes they would prefer indicted. For example, the hierarchical or political position of a preferred indictee might be emphasized at the expense of that individual's control over subordinates or role in strategy and implementation. In 2002, 2003 and 2004, for example, the UN Security Council directed the ICTY to concentrate its work on persons of the most senior level, largely in response to concerns that a large caseload placed too great a cost burden on the UN.[269] After an inadequate response, the Security Council reaffirmed the preference for cases involving lower level accused to be referred to national courts.[270] In 2005, the ICTY interpreted the term "most senior leaders" to be those who "by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, [were] alleged to have exercised such a degree of authority that it [was] appropriate to describe them as among the 'most senior' rather than 'intermediate'."[271]

In 2006, the SCSL found that its mandate to prosecute persons bearing the 'greatest' responsibility constituted "at a minimum, political and military leaders and implies an even broader range of individuals."[272] While this lent a higher threshold, it also prompted more

[269] Ibid, 35-7.
[270] Ibid, 35-7.
[271] *The Prosecutor v. Dragomir Milošević*, ICTY Decision on Referral of Case Pursuant to Rule 11*bis*, IT-98-29/1-PT, 8 July 2005, para 22.
[272] *Prosecutor v. Brima et al*., ICTY Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, SCSL- 04-16-T, 31 March 2006, para 34.

serious consideration of financial supporters of parties to the conflict as well as other non-political or non-military actors.[273]

The ICC Appeals Chamber has recognized that the greatest responsibility criteria adopted by the prosecution[274] is a legitimate prosecution policy decision but is not a legal requirement for ICC assertion of jurisdiction. The Appeals Chamber found that the greatest responsibility criteria are dependent on available evidence and consideration of the relationship between the specific crimes, the chain of command and the position of the accused.[275] This position allows States to cooperate in such a way as to direct investigations towards specific episodes of abuses and not others. Selectively investigating particular episodes facilitates indictment of particular persons of variant seniority.

2.2.6.4 Direction to employ specific criteria

Whether provided within the statute or correspondence between creating parties, prosecution case selection can be directed to place specific emphasis on the nature of criminality to be prioritized. Inter-institutional misunderstanding or inconsistent application of criteria between international crimes prosecutions impedes the development of normative case selection criteria States view as binding (the 'obligation').[276] A weaker norm of case selection criteria leaves criteria more vulnerable to political manipulation. This instrument is already less blunt and less conspicuous than its jurisdictional design

[273] Indicted personnel included a priest ostensibly wielding supernatural powers and the head of State of a neighboring country who allegedly supported a party to the conflict.
[274] ICC-OTP September 2007.
[275] See for example: Seils 2009; *Prosecutor v. Bosco Ntaganda*, Under Seal Ex parte, Prosecutor only, Judgment on the Prosecutor's appeal against the decision of the Pre-Trial Chapber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04, 13 July 2006, para 42-62.
[276] Utmelidze 2009, 136.

peers. However, it may also be particularly influential for case selection, especially when combined with court designs that cause courts to be financially dependent on States.

The extent to which criteria can be instructed varies between courts. In the Argentine experience, consultation with, and participation by, victims groups and other stakeholders, instructed the determination of criteria over an extended period of attempted political obstruction.[277] In other situations, courts are provided very specific criteria to be followed.

The statutes and laws that empower international and internationalized courts generally recognize the need to prioritize case selection by targeting those most responsible for crimes. Courts have generally been directed to interpret those of greatest responsibility as those with command control over forces that committed crimes.[278]

The ECCC, are granted a diverse category of crimes under international humanitarian law, but are required to select crimes 'most illustrative' of those committed during the period of Democratic Kampuchea (Modern day Cambodia from 1975-9).[279] The ECCC may select the crimes with the greatest number of victims and the broadest geographical impact, while considering the proportionate magnitude of crimes inflicted upon specific sectors of the population.[280] These directions infer the norm of prioritizing cases of 'gravity', and also suggest that crimes 'most illustrative' of the conflict should be given preference.

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[277] Goransky, 77.
[278] Article 11-12, Rome Statute; Updated ICTR Statute; Updated ICTY Statute; STL Statute; SCSL Statute; Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the Period of democratic Kampuchea, 6 June 2003.
[279] Ahmed and Day 2009, 84.
[280] Ibid., 84.

Identifying the 'most illustrative' crimes places a burden on the prosecution and upon the rigor and reliability of observer group reporting of abuses. Targeting the 'most illustrative' crimes may also cause the prosecution to lean towards popular perceptions of the crimes committed, and potentially, away from empirical data collected during investigations. A directive to target the 'most illustrative' crimes ensures that crimes committed outside the established narrative, are unlikely to be pursued. Actors involved in crimes not covered in the mainstream media or subsequent historical narratives, may be protected from prosecution by 'most illustrative' directives. Where these culpable actors are associated with, or connected to States designing a court, those States may attempt to shape the historical narrative in an attempt to protect connected actors with a 'most illustrative' directive. 'Most illustrative' directives provide assurance and predictability for court-designing actors in the case of unexpected exposure of unknown or deliberately understated episodes of politically sensitive criminality.

Narrow directives were provided to the prosecutor of the SCSL. The Security Council had directed the prosecutor to target "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".[281] This required the prosecutor to have a comprehensive understanding as to the crimes committed, persons most responsible for them, and political, security, and economic context in which the 1999 peace process disintegrated. When combined with the limited capacity provided to the court, the prosecutor was required to adopt a narrative of

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[281] *Prosecutor v. Brima et al.*, Decision on defence motion for judgment of acquittal pursuant to rule 98, SCSL-04-16-T, 13 – 14, para 32.

the peace process's disintegration normatively adopted by governments and the press but not seriously vetted or corroborated in any way.[282]

2.3 State Cooperation

Methods of cooperation provide States with a final method of influence over the selection of international crimes cases. During courts' functioning, state cooperation has been described by former ICTY prosecutor, Carla Del Ponte as "the issue of all issues".[283] Part two examines cooperative methods available to States to effect case selection independence. The affect of cooperative methods is influenced by design elements that instruct how financially independent a court is, its autonomy at the Court's location, and the extent to which States are compelled to cooperate. Courts' dependence on design elements to procure State cooperation also suggests design methods that facilitate greater or reduced scope for cooperative impact on case selection.

2.3.1 Capacity to compel cooperation

Keohane et al. identify as a court's 'legal embeddedness', the extent to which a Court's decision can compel cooperation from a State through legal arrangements.[284] For Keohane et al., the extent to which institutions such as the Security Council or domestic Courts are empowered to compel cooperation, is instructive as to a Court's capacity to function independent of pressure from States.[285] The extent to which a prosecution is able to

[282] The report of the SL-TRC strongly contradicted many of the established truths associated with the conflict. However, its findings have had little impact on the normative historical narrative. See Chapter on the 'Military and Political History of the Conflict' in the Report of the SL-TRC.
[283] 19 July 2004 ICTY press conference cited in: Peskin 2008, 13.
[284] Keohane et al. 2000, 466.
[285] Ibid., 467.

independently investigate and obtain all evidence is either enforced by power inherent in a courts enabling Statute or is a State prerogative. Without power to compel by way of incentive or through punitive action, Courts function at the discretion of States.

The power to compel cooperation varies between Court models. The most robust model thus far, in procuring broad State compliance in all modes of cooperation, has been that of the ad-hoc international criminal tribunals. Due to the fact that they enjoy Chapter VII status, ad-hoc international criminal tribunals command the cooperative leverage of the UN Security Council. This of course does not guarantee punitive action against States unwilling to cooperate, but merely compels cooperation under international law, providing a heightened level of 'obligation'. Similarly, the Rome Statute compels States under International Law to cooperate with it under the principle of *pacta sunt servanda* (agreements must be kept). The ICC enjoys only the voluntary support of the Security Council. The internationalized models require only the States that have signed an agreement with the UN to cooperate, unless Security Council Resolutions requiring cooperation are passed. These issues are exaggerated further for national prosecutions of international crimes, which require extradition and other treaties facilitating cooperation. Despite the variant degrees of legal compulsion and international legitimacy these models hold, the relative weakness in compelling State cooperation lends States an instrument with which to shape case selection.

Cooperative methods, or the threat thereof, can affect case selection at different stages of court design, prosecution analysis, investigation, or trial. The phase prior to indictment is that most susceptible to State attempts to manipulate case selection via cooperative methods. Before a case is selected or even investigated, prosecutors may anticipate variant levels of cooperation in procuring evidence, arresting suspects and facilitating impartial witness testimony. During investigations, prosecutors may decide whether to continue investigating particular crimes or accused based on State attempts to actively impede investigations, to withhold cooperation or to fully cooperate. Where prosecutors adjust their investigative focus according to experienced or anticipated State cooperation, States have been successful in employing cooperative methods to shape case selection. The remainder of this section is concerned with the methods of cooperation available to States, why these modes are available, and how they effect case selection.

2.3.2 Location

A court's location is an important element affecting court vulnerability to State cooperation. Like the criteria directive the Security Council issued to the SCSL, the SCSL prosecutor was also restrained by another element of court design – the Court's location. The Court was located in Sierra Leone, where the alleged crimes occurred.[286] This location was critical to the interests of the Sierra Leonean government because it assumed the power to end proceedings at any time. Forcibly closing or halting Court proceedings would breach the empowering agreement between the Sierra Leonean government and the UN. However, international legal obligations to fully cooperate with courts had been inconsistently enforced in the past.[287] The design feature of location 'in-country' lends a

[286] Section 11, Government of Sierra Leone, Special Court Agreement, 2002 (Ratification) Act, 2002 (Act 22 of 2002), Freetown: Sierra Leone, Gazette 133.
[287] Consider the disparity in consequence for the Rwandan government comparative to the government of Serbia. See Del Ponte 2009.

local government greater means of non-cooperation than it would otherwise enjoy. These circumstances naturally affect, as part two demonstrates, prosecution case selection. Location in the State where crimes were committed also provides confidence to local political actors to implicitly threaten non-cooperation, by publicly suggesting prosecution case selection. This arguably occurred in Cambodia where the Cambodian Prime Minister publicly suggested the ECCC refrain from undertaking any further investigations so as to limit the political fallout, by limiting the number of persons prosecuted.[288]

Although the governments of States where criminality took place still hold cooperative methods if courts are located outside the country, a localized court seat constitutes a deliberate intent on the part of designing actors to lend greater influence to States. Even if control over a court's site is not granted, cooperative methods, as used by the Rwandan government to shape ICTR, can still be effective. Nonetheless, the Rwandan government refused to vote for the empowering Security Council resolution creating the ICTR in part because the court would not be located in Rwanda.[289] Locating the court outside Rwanda removed the Rwandan government's capacity to cause court functions to cease. Locating a court in a State where crimes occurred may place persons wielding sufficient influence within that State, beyond the reach of the prosecution. It is unlikely that the Rwandan government was not cognizant of this fact whilst advocating for the ICTR's Rwandan location.

[288] Sothanarith, Kong. "US War Crimes Ambassador Wants Cases Pursued," *VOA News*, 17 January 2011.
[289] Kaufman 2008, 255.

2.3.3 Financial Independence

Control over material and human resources are some of the elements cited by Keohane et el. as comprising part of the 'independence' element of delegation.[290] One critical element of design instructive to the impact of State cooperation is the extent to which a court enjoys fiscal sovereignty. A court's fiscal sovereignty instructs the dependence of a court on the financial benevolence of States to carry on operations. It may also instruct case selection sympathetic to the interests of, or based upon anticipated sources of funding from States.

Two broad levels of financial dependence design have emerged. The first is the model employed by the ad-hoc international criminal tribunals, the ICTY and ICTR.[291] These courts were established as Chapter VII organs of the UN. This meant they were able to draw from the UN consolidated fund. They are therefore guaranteed assessed funding. Similarly, the ICC receives assessed contributions from the Assembly of States Parties (ASP).[292] The ASP determines the size of the contribution provided by each state by employing the same scale adopted by the UN.[293] The provision of responsibility to the ASP' subsidiary body, the Committee on Budget and Finance, undermines the capacity of single States to affect Court finances.[294] It has recently allowed budgetary expansion only inline with the 1.3% rate of inflation experienced in The Netherlands, where the court is located.[295] While this financial constraint limits the number of new cases the office of the

[290] Keohane et al. 2000, 462.
[291] Article 30, Updated ICTR Statute; Article 32, Updated ICTY Statute.
[292] Article 115(a), Rome Statute.
[293] Ibid., Article 113-118.
[294] Ibid., Article 117.
[295] The American NGOs' Coalition for the ICC. *Report on the Ninth Session of the Assembly of the States Parties*. December 2010.

prosecutor might be able to investigate, it limits individual States' capacity to leverage financial provision to influence case selection.

The second model is that provided to the 'internationalized' courts established under agreement between the State in which the crimes were committed and the UN. These courts include the SCSL, the ECCC and the STL. They are dependent on voluntary contributions from States. This leaves the respective court registrars or Office of Administration director, at times assisted by court prosecutors,[296] to lobby States for money.[297] Courts dependent on voluntary contributions are more accountable to fewer States. They are therefore more vulnerable to those States interests than courts receiving assessed, but guaranteed, contributions from the ASP or the UN. The prosecutor of the SCSL, for example, has had to allocate significant time and resources to lobbying foreign governments for money to keep the court going. The court's primary dependence on three donor States provides those States with significant influence over the prosecutor.[298]

However, the case of the ICTR demonstrated that even the international ad-hoc tribunals are not immune to re-design if donor fiscal capacity is tested, particularly if accompanied by a shift in the positions of powerful States. After the episode of Rwandan non-cooperation, relating to the investigation of RPF crimes, the Security Council provided an avenue for reconciliation between the Court and the Rwandan government. This avenue

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[296] Antonio Cassese. *Report on the Special Court for Sierra Leone*. 12 December 2006, 11, 54.
[297] Article 12, STL Statute; Article 16, SCSL Statute; Article 8, Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the Period of democratic Kampuchea; Fund of the UN Assistance to the Khmer Rouge Trials (UNAKRT). *Details of UNAKRT Pledges and Contributions 2006-2011*.
[298] See the Chapter on the SCSL.

was presented in the form of a completion directive that required the ICTR to complete investigations by 2004 and its activities by 2010.[299] It directed the ICTR to refer cases of intermediate to lower-ranked accused to national jurisdictions, including Rwanda.[300] The prosecution interpreted that directive by ceasing all investigations of RPF crimes, regardless of seniority. The prosecution's design interpretation was accepted by the Security Council, which had provided implicit instruction to cease investigation of RPF crimes.[301]

The ad-hoc international criminal tribunal model on the other hand, is not as vulnerable to fiscal intimidation as the internationalized courts. However, systemic weaknesses remain. Sophisticated Security Council States are able to cite limited financial capacity to justify politically expedient case selection criteria directives. This occurred at the ICTR where 'efficiency' was used to justify both the replacement of a prosecutor and the limitation of resources. The 'efficiency' action caused a revision of case selection criteria that excluded prosecution of RPF crimes.[302] The revision of case selection at the ICTR demonstrates the effectiveness of simultaneously employing multiple instruments of cooperation accompanied with politically expedient theoretical justification.

The instrument of financial provision can be used not only to shape case selection. It can also be used to reinforce it. Where a State views case selection as favorable, it may reinforce that case selection by disproportionately financing the prosecution comparative to

[299] UN Security Council, *Security Council Resolution 1503*, 28 August 2003.
[300] Ibid.
[301] UN Security Council, *United Nations Security Council Resolution 1534* 26 March 2004, S/RES/1534.
[302] Del Ponte 2009, 237-241.

the defence. Disproportionate funding of the prosecution facilitates more robust investigation and comparatively weaker defence of selected cases than in an equitably funded trial. Disproportionate funding may also stimulate zealous or unethical practices where personnel are cognizant of political impetus to successfully prosecute particular individuals. In the SCSL case, unethical investigative inducement of witness testimony was assisted with disproportionate US funding of the prosecution.[303]

2.3.4 Apprehension and surrender of accused

The most belligerent cooperative method available to States is the refusal to hand over suspects or accused. State failure to provide an accused impedes the commencement of proceedings. In the instance of the STL, the designing actors endowed the court with the power to try accused in absentia in the case they could not be found or where States were unwilling to hand them over.[304] The courts in the Republic of Serbia have already sentenced accused in absentia (where accused are not before the court).[305] Prosecutors may refrain, as in Canada and at the European Court of Human Rights, from expending resources to pursue alleged perpetrators, where there is no reasonable prospect of securing extradition.[306] In Croatia, where accused are provided for trial without popular national

[303] See chapter four, on the SCSL. See SCSL chapter in: Chris Mahony. *The Justice Sector Afterthought: Witness Protection in Africa*. Pretoria: Institute for Security Studies, 2010.
[304] Article 22, STL Statute.
[305] Kandic 2009, 117.
[306] Terry Beitner, "Canada's Approach to File Review in the Context of War Crimes Cases," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 91; Vladimir Tochilovsky, "Post-conflict Criminal Justice: practical and policy considerations," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 168; *Jabłoński v. Poland*, Judgement, ECHR, 21 December 2000, para. 102; *Abdoella v. The Netherlands*, Judgement, ECHR, 25 November 1992, para 24.

support, prosecutors have experienced mixed success in pursuing some cases but not others.[307]

The Balkans on the other hand, has proved particularly hostile territory for the surrender of persons indicted for international crimes. In his analysis of the ICTY and the ICTR, Victor Peskin cites the political battles over cooperation waged within the domestic political arena, be it authoritarian, transitional, or established democracy, as well as within the international community.[308] Peskin cited democratically elected leaders, particularly in the transitional democracies in Serbia and Croatia, as holding greater incentive to cooperate with the ICTY. Autocratic States such as Sudan have proved more belligerent about refusing to arrest and hand over suspects in the face of international pressure.[309] Even the leading opposition candidate in Sudan's previous presidential elections stated he would not hand over Sudan's President, Omar al Bashir to the International Criminal Court.[310] Sudan viewed the case as illegitimate due to the fact that - like three of the P5 members that provided jurisdiction over Sudan to the ICC, China, Russia and the US – it is not a party to the Rome Statute. The principle of *pacta tertiis nec nocent nec prosunt* dictates that a treaty binds the parties and only the parties; it does not create obligations for a third state.[311] Young democracies like Sudan and Kenya, face substantial disincentives to cooperate such as vulnerable governing coalitions, and potential instability driven by

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[307] Terselic 2009, 105.
[308] Peskin 2008, 13.
[309] ICC-OTP, *Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)*. 9 December 2010.
[310] Maram Mazen. "Sudanese Candidate Al-Mahdi Wouldn't Hand Over Bashir to ICC," *Bloomberg News*, 1 February 2010.
[311] Article 34, Vienna Convention on the Law of Treaties, 1969.

security sector or civilian pockets of discontent.[312] For example, the assassination of Serbian Prime Minister Zoran Djindjic, which was largely motivated by attempts to impede Serbian surrender of suspects, indicates this threat.

Serbia's reluctance to surrender leader, Slobodan Milosevic, was driven by domestic security and political considerations, particularly the threat of instability posed by Serbian nationalists.[313] The domestic security threat was only overcome by economic conditionality imposed on Serbia by the US.[314] The then ICTY prosecutor, Carla Del Ponte, travelled to Washington DC prior to the June 2001 donor's conference on Serbia.[315] On this trip, Del Ponte convinced then Secretary of State Colin Powell, that US economic conditionality was the critical ingredient to securing Serbian surrender of Milosevic.[316] US diplomatic pressure was critical to securing consensus amongst key NATO members that Serbia should surrender Milosevic to the ICTY. The initial absence of German and French pressure was overcome by the threat that the US would lead 'with or without them'.[317] In the face of NATO consensus, Russian and Chinese opposition was rendered impotent as the 29 June 2001 Serbia-donors conference went ahead. The need for the ICTY to solicit the support of major NATO powers, particularly the US, to procure Milosovic and other Serbian accused's surrender, provided NATO particular power over the ICTY prosecution. Prosecution restraint from indicting NATO personnel for the 1999 bombing of Serbia may have been influenced by prosecution dependence on NATO for apprehending high profile

[312] Peskin 2008, 13.
[313] Ibid., 68-71.
[314] Ibid., 68-71.
[315] Del Ponte 2009, 112.
[316] Ibid., 113.
[317] Ibid., 115-8.

accused, such as Milosovic. US and European leverage over Serbian EU membership proved critical in the May 2011 effort to obtain the surrender of Ratco Mladic. Mladic's arrest coincided with the visit to Serbia of High Representative for Foreign Affairs and Security Policy of the EU, Catherine Ashton.[318] French president, Nicolas Sarkozy supported the view that Serbian action was prompted by the carrot of EU integration, calling Serbia's arrest of Mladic "one more step" in that direction.[319] As well as the timing of the EU Foreign Affairs Representative's visit, Mladic's extradition also pre-empted ICTY chief prosecutor Serge Brammertz's report to the Security Council. His report was expected to label Serbian attempts to capture Mladic as 'failing'.[320]

The absence of comparable British and US support for ICTR investigations of RPF crimes[321] indicates the absolute prerequisite status of powerful States support for court acquisition of suspects. In the case of the Rwandan government, the US was actively providing electronic monitoring devices that Rwandan intelligence used to monitor and impede ICTR investigations of RPF crimes.[322] Support from the US and the UK meant Rwanda could refuse to hand over RPF accused, were they to be indicted, without concern it would face similar pressures to that experienced by Serbia. The relative impunity of Rwandan intransigence caused ICTR case selection policy to shift, ending investigation of RPF crimes. Rwandan non-cooperation in the face of a Security Council created tribunal set a clear precedent for case selection consideration at future courts.

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[318] Stephen Castle. "Mladic Arrest Opens Door to Serbia's Long-Sought European Union Membership," *New York Times*, 26 May 2011.
[319] Ibid.
[320] Doreen Carvajal and Steven Erlenger. "Serb Fugitive Slowly Starved of Friends and Cash," *New York Times*, 29 May 2011.
[321] Del Ponte 2009, 183.
[322] Ibid., 183.

The extent to which the ICTR non-cooperation precedent affects ICC case selection, currently considered by the US to be within its interests, is unclear. The benefits of tacit US approval of ICC case selection would be significant for ICC capacity to apprehend suspects. Thus far, case selection in Uganda, the DRC, Sudan, the Central African Republic (CAR) and Columbia broadly reflect US interests. US vulnerability to proceedings against its own officials was demonstrated in 2004 when legal action was brought in Germany against then US Secretary of Defense, Donald Rumsfeld for war crimes. The US made clear the action "could adversely impact" US relations with Germany.[323] A German prosecutor announced he would not pursue the matter a day before Rumsfeld was due to be a keynote speaker at a conference in Munich.[324]

2.3.5 Investigative access to territory

Before suspects are indicted, investigations are required to verify reported episodes of criminality. Permission to access territory, like apprehension of suspects, presents an overt method of State impediment to a court's function. Restricting personnel from accessing territory is distinguished from non-surrender of suspects because, as well as shaping or attempting to shape case selection, it can completely halt the function of a court. Prohibiting or impeding court personnel from access to State territory sends a very clear message to a prosecutor or court, that the court's existence, function or case selection is rejected by the State concerned.

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[323] Adam Zagorin. "Exclusive: Charges sought against Rumsfeld over prison abuse," *Time Magazine Online*, 10 November 2006.
[324] Ibid.

The Rwandan government's non-cooperation on ICTR access to territory is a pertinent case. The restrictions made clear the government's rejection of any ICTR investigation of RPF crimes. The ICTR prosecutor refrained from indicting Paul Kagame because she believed he would have employed his power of ICTR access to Rwandan territory to shut down genocide trials.[325] In this case, the prosecution were aware of the extent to which the Rwandan government's position in power was dependent on the support of the Rwandan army, made up largely of former RPF officers.[326] The prosecution was also aware that the Rwandan government was monitoring prosecution personnel, including eavesdropping on electronic and telecommunication.[327] Despite the perceived threat of non-cooperation, then prosecutor Carla Del Ponte, notified the Rwandan government she would independently exercise her discretionary right to pursue investigations.[328] Del Ponte's predecessor, Louise Arbour, had decided against investigating RPF crimes. Arbour believed the Rwandan government had infiltrated her office, was reading her mail, and would have known about an investigation immediately.[329] Arbour's fear that investigators would be killed had she investigated the RPF deterred her from doing so.[330] The Rwandan government had impeded the creation of commissions of enquiry into the assassination of former Rwandan President, Juvenal Habyarimana.[331] When the Rwandan government made it implicitly clear that it knew of all witness contacted by ICTR investigators and all evidence gathered, the prosecutor decided it was unsafe to continue investigating inside Rwanda.[332]

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[325] Del Ponte 2009, 235.
[326] Ibid., 183.
[327] Ibid., 183.
[328] Ibid., 183-4.
[329] Peskin 2008, 190.
[330] Ibid., 190.
[331] Tribunal de Grande Instance de Paris. First Vice-President, Chambers de Jean-Louis Bruguiere. *Issuance of International Arrest Warrants*. Order to Execute. Doc PI06-0046 (E). 9 January 2007, 2-4.
[332] Del Ponte 2009, 191.

Conducting investigations outside a State in which crimes occurred makes the acquisition of sufficient evidence to prosecute a lot more difficult.

The ICC, in its investigation of crimes committed in Sudan, also encountered access difficulties. The ICC's Sudan investigation was conducted outside the country because the Prosecutor perceived Darfur's continuing insecurity as "prohibitive of effective investigations inside Darfur."[333] Prosecution investigators were forced to locate themselves in Chad.[334] Their location outside Sudan made them more susceptible to State cooperation on information and intelligence sharing, as well as access to and protection of witnesses.

Courts located in the State in which crimes occurred are disproportionately vulnerable to personnel restrictions on access to territory. Expulsion of personnel from the State in which a court sits restricts those personnel from access to offices, files and equipment, as well as the coordination of an efficient bureaucracy. For example, comments from the Cambodian Prime Minister, Hun Sen, suggesting the Khmer Rouge Tribunal not issue any further indictments presents a greater threat to court function than the same statement by a Serbian President.[335] The Prime Minister's comments caused concern amongst groups such as HRW that investigating judges "acted precipitously to shut down" investigations in response to anticipated Cambodian obstruction.[336] Investigating Judges have refrained

[333] ICC-OTP. *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)*.
[334] Ibid.
[335] Sothanarith 2011.
[336] Mike Eckel. "Groups Fear Khmer Rouge Tribunal May Halt Trials," *Associated Press*, 4 May 2011.

from visiting crime scenes, indicating an absence of intent to test the Cambodian government's will to impede further prosecution.[337]

2.3.6 Provision and appointment of personnel

The role of individual personnel, particularly prosecution and judicial personnel, in shaping case selection is critically instructive. State capacity to appoint or second court personnel, therefore, significantly affects case selection. Like State capacity to withhold cooperation on suspect apprehension or access to territory, the political space available to States to appoint personnel is largely instructed by court design. Design elements such as a sparsely funded court, exaggerate State influence in appointing personnel because States may make amenable personnel a condition for releasing funds. At the SCSL, for example, the US, the largest donor to the court, was able to select the Court's prosecutor, while the next largest donor, the UK, provided the registrar. Appointing the prosecutor gave the appointing power particular influence over case selection.

Van Aaken et al. cite three appointment aspects that indicate prosecution independence from the States: term length, renewability and appointing organ.[338] Historically, renewable terms of short length cause prosecutors to pander to the interests of the appointing body, as in the case of Carla Del Ponte's successor at the ICTR. Life long tenure for example increases prosecution independence. Carla Del Ponte described the one or two-year term at the ICTR the US lobbied to provide her, after her investigation of RPF crimes, as granting

[337] Ibid.
[338] Van Aaken et al. 2003, 9.

"less independence than a dog with a choker chain clipped to a short leash."[339] In their analysis of prosecution independence from the executive, Van Aaken et al. describe five modes of prosecution appointment: election by citizen vote, election by legislature or subset, appointment by the executive, appointment by the judiciary, or appointment by the procuracy.[340] Election by citizen vote (or for our purposes States Parties to the Rome Statute or members of the UNGA) requires prosecutors to pursue the preferences of the community of Nations in whose name a court functions. This may prompt the prosecutor to employ case selection perceived to be popular rather than strict application of the law. For the purposes of international courts, appointment by members of the legislature may constitute appointment by States elected to the Human Rights Council or members of the Security Council. These appointment processes allow significantly diminished independence given that the prosecutor becomes accountable to a smaller number of States.[341] Appointment by members of the executive, for our purposes, the executive of a State or the Secretary General, provides even greater influence over the prosecutor to the appointing party.[342] Van Aaken et al. claim that appointment by the executive, leads to the greatest likelihood of executive misuse of the prosecution against opponents, and the least likelihood of the executive itself being prosecuted for alleged crimes.[343] Accordingly, the judiciary or the procuracy, Van Aaken et al. claim, leads to greatest prosecution independence from the executive.[344]

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339 Del Ponte 2009, 234.
340 van Aaken et al. 2003, 9.
341 Ibid., 10.
342 Ibid., 10.
343 Ibid., 10.
344 Ibid., 10.

International crimes cases commonly occur during civil or international armed conflict involving parties or a party under the command of the State executive. Prosecution independence from the executive, therefore, is of elevated importance at courts prosecuting international crimes because the executive is more likely to bear criminal responsibility than in ordinary criminal cases. The same forces apply for prosecutors' promotion, transfer, or removal from office. Like the use of finance, the power of appointment is established in a court's design. States exercise of appointment cooperation as a method to affect case selection occurs immediately prior to and during the courts function. A clear example of the removal of a prosecutor and the cognizance of that removal is found in the previously described US and British rebuke of case selection at the ICTR. The ICTR prosecution's dropping of RPF cases after Hassan Jallow replaced Carla Del Ponte demonstrates the effectiveness of appointment cooperation.[345]

The process of prosecution appointment differs between court models. The adopted models include appointment by the host government, appointment by funding States, appointment by the Security Council and appointment by the ICC Assembly of States Parties.[346] At the Khmer Rouge Tribunal, for instance, the Supreme Council of Magistracy makes prosecution and judicial appointments.[347] The UN Special Representative of the Secretary General for human rights in Cambodia has "already expressed concern that the composition of the Supreme Council of Magistracy, which includes a government minister

[345] Del Ponte 2009, 234-241.
[346] At Nuremberg appointment was made by the allied powers, and at the International Tribunal for the Far East appointment was made by General MacArthur.
[347] Article 11, 18, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004; Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the Period of democratic Kampuchea.

and a member of the ruling party's Permanent Committee, does not inspire confidence that the judicial appointment process in Cambodia is free of political control."[348] The appointment circumstances and the perceived responsiveness of judicial investigating authorities to the preferences of the Cambodian executive, reinforce van Aaken et al.'s theory of committee or pseudo-executive[349] appointees as lacking independence. In another example, the UN Secretary General, and the President of Sierra Leone made the appointment of the SCSL chief prosecutor and deputy prosecutor, respectively.[350] Because of the voluntary funding mechanism at the Special Court, the US, who is also the court's largest donor, was empowered to nominate to the Secretary General an appointee. This allowed the US to appoint David Crane from within its own Department of Defense. The Government of Sierra Leone was empowered to participate in both appointments. Reflecting the theory of van Aaken, the prosecutor refrained from indicting Sierra Leone's President, Ahmed Tejan Kabbah, who the SL-TRC found was most culpable for crimes committed by a party to the conflict.[351]

Unlike the appointment of the Special Court prosecutor, the US required the support of other Security Council members to secure its preference for prosecutor at the ICTY and ICTR. After ICTR prosecutor, Carla Del Ponte, refused to cease investigation of the RPF, the US had to convince other P5 members to have her removed.[352] Procuring Security

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[348] Mandates of the Special Representative of the Secretary-General for human rights in Cambodia and the Special Rapporteur on the independence of judges and lawyers. *Joint Public Statement*. 23 August 2007.
[349] Pseudo-executive being for the purposes of examining international courts, the empowerment of one State to appoint the prosecutor.
[350] Article 3(1-2), Agreement between the UN and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, 16 January 2002; Article 25(3), SCSL Statute.
[351] SL-TRC. *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol 2, 2004 Accra: GPL Press, 68, 70-71, 80.
[352] Del Ponte 2009, 231-239.

Council support did not prove difficult due to member disinterest in the Court.[353] The ease with which Del Ponte was replaced set a precedent that was recognized by her successor who ceased investigation of RPF crimes.

Finally, the ASP holds a secret ballot to elect the ICC prosecutor to a single nine-year term.[354] The ICC prosecutor, therefore, enjoys greater security of tenure, election by a greater number of States, and greater independence than other international prosecutors. A prospective ICC prosecutor, according to the theory of van Aaken, will have to carefully navigate the popular will of the States Parties in order to secure appointment. However, once appointed, ICC prosecutors will have little concern as to security of office. Security of tenure significantly mitigates scope for State manipulation of case selection through implicit or explicit threat of removal.[355]

Appointment of judicial personnel may also affect case selection independence. A recently published email written by ICTY Judge Frederick Harhoff accused the ICTY President Theodor Meron of attempting to dilute the responsibility of persons wielding command responsibility.[356] In his letter, Judge Harhoff alleges that Meron, a US citizen and former Israeli diplomat sought to diminish command responsibility to advance Israeli and US interests.[357] Meron's interpretation significantly diminishes the 'aiding and abetting' mode of liability by requiring that aid must not merely be directed towards an armed group's

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[353] Ibid., 237-239.
[354] Article 42(4), Rome Statute.
[355] Van Aaken et al. 2003, 9-10.
[356] Email from Justice Frederick Harhoff of the ICTY to 56 contacts, 6 June 2013.
[357] Ibid.

general war effort, as held previously,[358] but be directed specifically towards the crimes in the indictment.[359] The Justice Meron-led ICTY Appeal Chamber held that specific direction could be established by linking the act of providing material support to the act of the crime. Justice Meron, along with Justice Agius have sought to take the position even further, requiring that the evidence must establish the mental intent (*mens rea*) of the accused to provide material support specifically for the execution of the specific crimes.[360] Harhoff's allegations demonstrate how judicial actors, if influenced by States, may adjust the mode of liability or the threshold of liability (the precision), as well as develop inconsistency in case law, undermining the precedent of decades of developed case law (the level of 'obligation'). A confidential US State Department cable appears to support Harhoff's suggestion of collusion between the US and Meron. The cable describes Meron's request that the US remove ICTY prosecutor, Carla Del Ponte.[361] In their examination of judgments at the ICTY and ICTR, Bachman, Sparrow-Botero, and Lambertz identify the expanded autonomy and discretion of judges at the ad-hoc tribunals, rendering them more endearing for State and other actors seeking to shape case selection.[362]

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[358] *Prosecutor v Mile Mrksic et al.*, ICTY Trial Chamber Judgement, IT-95-13/1-T, 27 September 2007, para 126; *Prosecutor v Mile Mrksic et al.,* ICTY Appeals Chamber Judgment, IT-95-13/1-A, 5 May 2009, para 159.

[359] *Prosecutor v Momcilo Perisic*, ICTY Appeals Chamber Judgment, IT-04-81-A, 29, para 72.

[360] *Prosecutor v Momcilo Perisic*, ICTY Joint separate opinion of Judges Theodor Meron and Camrel Agius, IT-04-81-A, 28 February 2013, 1, para 4.

[361] US Department of State, Diplomatic Cable, *ICTY: President Meron urges USG to oppose Del Ponte renewal*. 17 July 2003, 03THEHAGUE1827_a.

[362] Klaus Bachmann et al. *When Justice Meets Politics: Independence and autonomy of ad hoc international criminal tribunals.* Frankfurt: Peter Lang, 2013.

2.3.7 Witness-oriented cooperative practices

One method facilitated by disproportionate prosecution funding at the SCSL for example, were measures used to 'protect' witnesses who cooperated with prosecution investigators. The Court's investigative staff employed methods of material provision for witnesses under the guise of protection that could be viewed as inducement.[363] Inducement compromises the rights of the accused by offering favor or advantage in return for testimony that incriminates an accused. The ICC has inferred that only relocation is of sufficiently significant advantage to warrant being removed from the discretion of the prosecution.[364] Provision of material or other benefit by prosecutors to induce incriminating testimony may be used to disproportionately reinforce politically expedient case selection.

State cooperation on access to and protection of witnesses can be used to shape or impede case selection. In attempting to shape prosecution investigations and decision making prior to cases being selected for prosecution, States may provide access to some witnesses, but not others, or assistance in protecting some witnesses, but not others. Protection assistance or access may be difficult for a prosecution to procure when elements of the security services from which they seek cooperation are linked to episodes of criminality under investigation. The prosecution is required, under such circumstances, to engage in very discrete investigative methods that may be more time consuming, more costly, or in some instances not possible. The cost or inability to gather evidence under such conditions may

[363] See SCSL Chapter in: Mahony 2010.
[364] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICTY Judgment on the appeal of the prosecutor against the "decision on evidentiary scope of the confirmation hearing, preventive relocation and disclosure under article 67(2) of the statute and rule 77 of the rules" of Pre-Trial Chamber I, Appeals Chamber, 26 November 2008, ICC-01/04-01/07 OA 7, 35.

make meeting an evidential threshold required to substantiate an indictment, impossible.[365] Witness oriented cooperation, therefore, is a subtle yet effective method of shaping case selection by preventing investigative access to a critical evidential source. This method may be reinforced with active cooperation relating to investigation of cases a State prefers to see prosecuted. Some observers in Uganda for instance, view the reluctance of the ICC prosecutor to investigate crimes committed by the UPDF as a consequence of anticipated non-cooperation on witness access and other forms of cooperation.[366]

Inadequate protective cooperation has formed a common method employed by States to impede unwanted prosecution of international crimes cases. At the national level in Croatia, witness support provided by the State has been insufficient.[367] At the international level, State cooperation has been a similarly significant obstacle. At the ICC, one justification for conducting investigations outside Sudan was the potential threat to personnel and witnesses caused by in-country investigations.[368] As a consequence of State inability or unwillingness to cooperate, witness protection programs have been established at every international court prosecuting international crimes since the creation of the ICTY.[369]

Although States may be unable or unwilling to provide the levels of protection to witnesses required by courts prosecuting international crimes, they may provide it selectively.

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[365] Tochilovsky 2009, 168.
[366] Clark 2010.
[367] Terselic 2009, 105.
[368] *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005).*
[369] Mahony 2010.

Providing selective assistance to prosecutors' seeking to access and protect witnesses, allows States to shape the evidence available. Impeding prosecution evidence in this way allows States to conceal some episodes of criminality while drawing disproportionate attention to others. Where prosecutors pursue politically sensitive cases despite subtle State methods to divert them, the State may make witness protection so difficult that pursuing the case becomes prohibitive. This impediment would force the prosecution to attempt to pursue the case with other forms of evidence or with witnesses outside the State where the suspected crimes occurred. Due to the nature of contemporary crimes of international status, prosecutors are commonly dependent on witness testimony to meet the evidential threshold of individual responsibility. Crimes prosecuted at the International Military Tribunal at Nuremburg were supported by vast sources of documentary evidence. Contemporary international crimes prosecutions have access to less documentary or other evidential alternatives to witness testimony. Disproportionate dependence on witness testimony raises the stakes for prosecutors seeking State cooperation on witness access and protection.

The increased importance of access to witnesses for prosecutors investigating international crimes is also pertinent to a court's ability to function. As where the Rwandan government prevented ICTR witnesses from travelling to testify, restraining witness participation can bring a court to a standstill.[370] The Rwandan government also provided discrete encouragement to victims groups to withhold witness cooperation.[371]

[370] Del Ponte 2009, 186.
[371] Peskin 2008, 199-204.

One important element of Rwandan government cooperation was its influence over implementation of post testimony relocation.[372] Rwandan government insistence that witnesses be relocated inside Rwanda, in close cooperation with Rwandan law enforcement and intelligence, disincentivized prospective witnesses in RPF cases. Foreign reluctance to receive ICTR witnesses reinforced the Rwandan government's witness cooperation influence by denying the ICTR alternative relocation destinations.[373] When added to the government's close cooperation with Tutsi non-governmental organizations, the Rwandan state wielded significant influence over witnesses testifying before the ICTR.

2.3.8 Dependence on NGOs for sources/witness testimony

One of the dangers of emerging trends in prosecution cooperation with NGOs is the scarcity of organizations that prosecutors selecting international crimes cases draw upon. Amnesty International senior legal advisor, Christopher Hall, cites the close consultation of civil society with prosecutors during the mapping and categorization of crimes and suspects.[374] The 'difficulties' commonly associated with gathering evidence often involve the safety of approaching, contacting, and maintaining contact with witnesses.[375] The close relationship between International Courts and organizations already possessing evidence of criminal conduct, create problems of security for both NGO and court personnel. The relationship also compromises the independence of prosecution case selection because NGOs may not have a presence or sufficient capacity in some States. The problem lies in

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[372] Mahony, 2010, 73-4.
[373] Ibid., 73-4.
[374] Christopher Hall, "Danger of Selective Justice: all cases involving crimes under international law should be investigated and the suspects, when there is sufficient admissible evidence, prosecuted," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 125-6.
[375] Tochilovsky 2009, 168.

the scarcity of organizations employing levels of investigative capacity and methodological rigor adequate to be relied upon by a prosecutor to initiate prosecution investigations. The restricted capacity of prosecutors with jurisdiction over international crimes causes them to rely on such organizations for information and witnesses providing the basis to examine an alleged episode of offending.

This issue has been of particular contemporary significance due to the ICC's opening of investigations in the DRC, the CAR, and Sudan, which reflect HRW reports. Every indictment in each of these situations reflects broadly and in many instances crimes examined in a HRW report. One cannot be certain of the Uganda indictment because of redactions within it. However, concentrations of HRW reports addressing crimes in the same year and region indicate the reports may have stimulated ICC investigative interest. The tremendous volume and temporal and geographic spread of crimes in the Sudanese, CAR, and Congolese cases, suggest narrow episodes in the indictments reflecting those reported by HRW are not a coincidence.[376] This coincidence is particularly unlikely given the admitted cooperation between NGOs and the ICC.[377]

[376] Compare episodes of criminality in: *Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of arrest for Jean-Pierre Bemba Gombo, ICC Pre-trial Chamber III, ICC-01/05-01/08, 23 May 2008, with: Human Rights Watch. *Central African Republic, State of Anarchy: rebellion and abuses against civilians*. Vol 19 No 14(A), September 2007, 26-7. Compare episodes of criminality in: *Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Warrant of arrest for Omar Hassan Ahmad Al Bashir, ICC Pre-trial Chamber I, ICC-02/05-01/09, 4 March 2009, 6 (footnotes), with Human Rights Watch. *They shot at us as we fled: Government attacks on civilians in West Darfur in February 2008*. May 2008, 10 (footnote 3), and Human Rights Watch. *Darfur Destroyed: Ethnic cleansing by government and militia forces in Western Sudan*. 6 May 2004, 23-24.Compare episodes of criminality in: *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") *and Ali Muhammad al abd-al-Rahman* ("Ali Kushayb"), Warrant of arrest for Ahmed Harun, ICC Pre-trial Chamber I, ICC-02/05-01/07, 27 April 2007, and; *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") *and Ali Muhammad al abd-al-Rahman* ("Ali Kushayb"), Warrant of arrest for Ali Kushayb, ICC Pre-trial Chamber I, ICC-02/05-01/07, 27 April 2007, with: *Darfur Destroyed: Ethnic cleansing by government and militia forces in Western Sudan,* 21-4. HRW reports focused prosecution investigations around Bunia in Ituri during the period of late 2002 to mid 2003. Compare episodes of criminality in: *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of arrest, ICC Pre-trial Chamber I, ICC-01/04-

This trend also undermines redactions in the indictments of accused in the Ugandan situation. Practices in Sudan, the DRC and the CAR suggest the Lord's Resistance Army (LRA) or other malicious actors could speculate as to the indicted episodes of criminality based on HRW reports.[378] This situation becomes deeply problematic for HRW personnel and operations. State and non-State parties to conflict may attempt to manipulate which crimes HRW personnel examine in order to shape ICC investigative focus and case selection. State or non-State party monitoring of HRW personnel might also be used to identify potential witnesses for future international crimes trials before a prosecution is able to approach them. States may also attempt to disproportionately facilitate NGO access to witnesses of crimes committed by adversaries. These circumstances potentially compromise the security of HRW personnel as well as the witnesses they approach and the integrity of case selection independence.

01/06, 10 February 2006 and; *Prosecutor v. Bosco Ntaganda*, Warrant of arrest, ICC Pre-trial Chamber I, ICC-01/04-02/06, 22 August 2006, with: HRW. *Ituri: "Covered in blood": Ethnically targeted violence in Northeastern DR Congo*. Vol 15 No 11(A), July 2003, 21-27; HRW. *The curse of gold: The Democratic Republic of Congo.* 1 June 2005, 27-32. Compare episodes of criminality in: Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Germain Katanga*, Warrant of arrest for Germain Katanga, Pre-trial Chamber I, ICC-01/04-01/07, 2 July 2007; *Prosecutor v. Mathieu Ngudjolo Chui*, Warrant of arrest for Mathieu Ngudjolo Chui, ICC Pre-trial Chamber I, ICC-01/04-02/07, 6 July 2007, with: HRW, *The Curse of Gold: The Democratic Republic of Congo*, 2005 26-50.

[377] ,Michel De Smedt, Chief of Investigations, ICC-OTP, 8 June 2009, The Hague, The Netherlands, interview n°66

[378] Compare episodes of criminality in: *Warrant of arrest for Raska Lukwiya*, ICC Pre-trial Chamber II, ICC-02/04, 8 July 2005, and; *Warrant of arrest for Dominic Ongwen*, ICC Pre-trial Chamber II, ICC-02/04, 8 July 2005, and; *Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005*, ICC Pre-trial Chamber II, ICC-02/04-01/05, 27 September 2005, and; *Warrant of arrest for Okot Odhiambo*, ICC Pre-trial Chamber II, ICC- 02/04, 8 July 2005, and; *Warrant of arrest for Vincent Otti*, ICC Pre-trial Chamber II, ICC-02/04, 8 July 2005, with HRW field research focused on the period 2002-2004: HRW. *Stolen children: Abduction and recruitment in Northern Uganda*. Vol 15 No 7(A), March 2003, available; HRW. *Uprooted and forgotten: Impunity and human rights abuses in Northern Uganda.* Vol 17, No 12(A), September 2005, 15-24; HRW. *Abducted and Abused: Renewed Conflict in Northern Uganda*. Vol 15 No 12(A), July 2003, 36-7.

2.3.9 State provision of evidence

Like the provision of access to NGO witnesses, access to NGO evidence, where provided disproportionately, can compromise the integrity of decisions to select cases for investigation. Similarly, State provision of evidence relating to criminality can emphasize one situation, conflict or role of a party to a conflict comparative to another. Information can also be provided that directs investigations toward some culpable individuals rather than others. Providing information selectively is therefore a potent case selection tool at the disposal of States, particularly States with large intelligence gathering apparatus. Access to evidence is particularly instructive given that it is often a prosecution pre-requisite for selecting an episode of criminality or an individual to be investigated.[379] An evidential threshold triggering an investigation was notably first adopted by the ICTY prosecution and the judicial authorities in the Bosnia and Herzegovina agreement on "The Rules of the Road".[380]

A classic example of State use of the provision of information is the enthusiasm of the US to provide information to the ICC's Sudanese investigations. The US State Department was pressed by the US House of Representatives to provide the ICC prosecutor interviews with "over 1,200 individuals that built up a case to declare genocide in Darfur."[381] The State Department responded, "If the ICC requires assistance, the US stands ready to

[379] Tochilovsky 2009, 168.
[380] Serge Brammertz, "The Interaction Between International and National Criminal Jurisdictions: Developments at the ICTY," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 174.
[381] Remarks by Representative Donald Payne of New Jersey: Subcommittee on Africa, global human rights and international operations of the Committee on International Relations. *Sudan: Losing Ground on Peace?* 1 November 2005, 31, 109-115.

assist…fully”.[382] This support of the ICC may be viewed as egregious by the Sudanese government because the US facilitated the referral of the Sudanese situation despite refusing, as does Sudan, to acknowledge ICC jurisdiction over its nationals. Russia and China have also refused to sign up to the Rome Statute but allowed the referral to pass the Security Council without exercising their veto.

The use of information to disproportionately push the prosecution of a case is particularly effective where a State is or was a party to a conflict. Where States were party to conflicts they are also more likely to hold incriminating and exculpatory information relating to international crimes. Despite their institutional conflict of interest, these States are particularly well placed to shape the direction of an investigation through the provision of evidence. However, States with large intelligence and other information gathering apparatus are also uniquely well positioned to provide information to shape case selection despite not having played a direct part in the conflict.

Access to evidence can also render investigations into widely reported abuses futile. Efforts to investigate widely reported episodes of criminality in Croatia and Serbia were undermined by an absence of State cooperation on information sharing.[383] This was also the case at the ICTR where the Rwandan government refused to handover files, documents and archives pertinent to the investigation of alleged RPF crimes.[384] States enjoy particular advantage comparative to insurgent groups when cooperating with courts on provision of information. States ordinarily enjoy greater intelligence capability than insurgent groups.

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[382] Ibid., 29,32.
[383] Terselic 2009, 105; Kandic 2009, 113.
[384] Del Ponte 2009, 185, 187, 191, 225.

Rwanda is a good example. When refusing to provide evidence and other forms of cooperation already discussed to the ICTR, the Rwandan President requested the ICTR prosecutor to investigate the French role in the genocide. Indicating that the prosecutor would act on any and all information, the prosecutor retorted, "give me the evidence…and I'm ready to do it".[385] Had the RPF been endowed with an intelligence apparatus capable of gathering that information during the genocide, it may have done so. External actors supporting the RPF were clearly less engaged or less willing to provide information incriminating the RPF, than the US was to support investigations of the Sudanese State, for example. External State support can strengthen the information sharing hand of an armed insurgency, as was the case in Sudan. This inequality of resources, whether it is State comparative to non-State actors or wealthy States comparative to poorer States, skews the probability of criminality being investigated in favor of well-endowed actors.

Preserving evidence and recording information at, or close to, the time of crimes' occurrence is also critical to the capacity of States or other actors to provide information to investigators. The US cites difficulty in procuring evidence long-after crimes occurred as demanding better preservation of evidence through improved design of post-conflict stabilization.[386] Attempting to gather evidence years after the fact, impeded investigation of crimes in the Balkans. Even with the resources of NATO at its disposal, documentation and evidence was lost in Kosovo because scarce specialized expertise was available to identify what was important and secure it. Similar disturbance of evidence occurred in

[385] Ibid., 226.
[386] Clint Williamson, "Remarks on Prioritization Criteria from the Perspective of the US War Crimes Program," in Morten Bergsmo (ed.) *Criteria for Prioritizing and Selecting Core International Crimes Cases*. FICHL Publication Series No. 4, 2009, 184.

Iraq, causing the US to create its own Office for the Coordinator for Reconstruction and Stabilization (S/CRS).[387] The S/CRS "enhances U.S. participation in UN peacekeeping missions, NATO missions, or interventions by the U.S. and other interested states" by providing it greater influence over the gathering of evidence.[388] The UK, Germany, and Canada have also undertaken similar initiatives.[389]

2.4 Conclusion

Many State methods of design and cooperation that affect case selection are interdependent. The chapter also illustrates how measures are often used together, in a coordinated way, to increase State capacity to shape case selection.

Some design elements impact the prosecutor's independence in selecting cases directly. These elements generally relate to statutory demarcation of prosecutorial jurisdiction. Where the prosecutor's jurisdiction is constrained as to the form of criminality, the territory upon which crimes occurred, the period of time in which crimes occurred and the nationality or other affiliation of persons having committed crimes, crimes are immediately placed beyond a prosecutors reach. However, other forms of design manipulation indirectly effect case selection by instructing State capacity to influence case selection through cooperative methods. Cooperative methods include, the location of a court in an independent State or within a State with an interest in case selection, the fiscal independence of a court from States, the provided case selection criteria or philosophy, and finally the extent to which courts are endowed with the capacity to enforce cooperation.

387 Ibid., 184.
388 Ibid., 184.
389 Ibid., 184.

Amnesty International has repeatedly called for the drafting, adoption and ratification of a multilateral treaty providing for mutual legal assistance regarding crimes under international law.[390] This idea holds merit. However, these initiatives, whilst furthering the interests of independent case selection, could be enhanced by similar multilateral undertakings to provide prosecution independence in a court's design. Constraining the use of design elements would mitigate the extent they could be used to undermine State cooperation obligations embedded in the kind of multilateral legal instrument Amnesty International suggests.

The creation of the ICC has taken a giant step in removing discretion from powerful States to create jurisdiction over alleged crimes on a case-by-case basis. Jurisdiction was formerly the primary discretion of the Security Council, and as a consequence its P5 members. The Rome Statute now primarily instructs jurisdiction. As we have seen, the Statute provides the Security Council the discretion to refer cases of States not party to the Statute, or to defer cases before the Court. However, the Court enjoys jurisdiction over crimes committed in the territories of, or by nationals of, any State Party without Security Council authorization. The ICC's assertion of jurisdiction constitutes a significant departure from the post-Cold War status quo in which the Security Council was the sole arbiter of court creation and jurisdiction. The ICC represents the consent of over 122 States to provide jurisdiction to the Court over their territories. The design-oriented provision of jurisdiction has to some extent been revised. The following chapters consider which interests those

[390] Hall 2009, 127.

revisions and shifts in cooperative behavior advance, and whether they constitute a justice cascade.

The empirical chapters of this thesis consider the extent to which the creation of the ICC has marked a departure from perceived victor's justice adopted by its predecessors. Identifying the elements of case selection independence helps identify the extent to which the cooperative precedent set by Rwandan intransigence toward the ICTR instructs ICC or SCSL prosecution case selection. The ICTR precedent provided US support for the Rwandan government's non-cooperation with the ICTR as the determining factor for a comparatively weak State in avoiding or resisting international pressure. The examination of each method of design and cooperation in this chapter illuminates the challenges facing independent prosecution of international crimes and the pressures that drive greater or diminished independence. States may choose to provide variant levels of cooperation but the extent to which they encounter punitive deterrents for non-cooperation such as sanctions, or incentives to cooperate such as EU membership, is contingent upon the clout they exercise amongst the international community. Whether that clout is driven by the power of norms or State interest is what an element-by-element consideration of case selection independence assists us to establish.

Prosecutors, therefore, must tread a very prudent line. If they push too hard with independent pursuit of all accused, they may be removed, have their investigations impeded or fail to apprehend suspects. If prosecutors fail to conceal politically informed case selection, the legitimacy of their office and the institution itself will be undermined. A crisis of legitimacy could also prompt State non-cooperation, particularly from those that feel they, or their allies, are disproportionately targeted. A clearer understanding of the variables available to States to shape case selection assists us in distinguishing independent exercise of prosecutorial discretion, prosecution pandering to political sensitivities, norm advancement and State manipulation of case selection. Distinguishing between these prosecutorial dispositions informs international relations explanations of how States interact with courts prosecuting international crimes.

Chapter 3

Conflating gravity and thematic prioritization: Case selection at the ICTR

3.1 Introduction

The UN Security Council established the ICTR in November 1994 to prosecute persons guilty of genocide and other serious violations of international humanitarian law surrounding the 1994 Rwandan genocide of ethnic minority Tutsi by ethnic Hutu. The court was the first tribunal of international character in Africa, and the first such court established to address crimes that occurred in Africa.

This chapter considers the case selection independence at the ICTR. In the introduction I identify the benefits of a contextualized narrative of the conflict that frees interpretation of case selection independence from the parameters of ethnicity, allowing a diversity of pressures on the prosecution to be considered. The contextualized approach is carried forward in the section on the conflict that seeks to de-ethnicize the narrative, allowing for examination of the interests of key actors that would subsequently affect the design and function elements of case selection. The engaged key actors were local, regional and global. The section on 'US engagement' identifies the critically instructive nature of US engagement to the nature of the conflict's conclusion and the international community's passivity towards reports of genocide. That section identifies America's realist prioritization of victory by a US client over efforts to halt the genocide. In the section on 'court design' I argue that the realist approach of the US government to the conflict also instructed its approach to the ICTR's design.

Uncertainties about sovereignty costs for P5 members, I argue, were impinged upon by their confidence in functional constraints and by the ‘pull factor’ of the emerging norm of international crimes prosecution. As I identify in the fifth section of this chapter, the Rwandan government sought an anatomical ICTR design. They did so because they held greater sovereignty cost concerns and less confidence in their functional manipulation than the P5. The Rwandan government sought to constrain the jurisdiction of the court to its predecessor government as well as supplementary functional leverage over the prosecution. In the sixth section I consider the political sensitivities of prosecution case selection in the court’s infant years, during the respective terms of Richard Goldstone and Louise Arbour. I then consider the term of Carla Del Ponte. In that section I examine the cooperative levers employed by the US and Rwanda to prevent the regime of Paul Kagame from being pursued. That section also concludes with an analysis of the current prosecutor’s justification for avoiding selection of crimes committed by Kagame’s forces. I conclude the chapter by considering the extent to which the norm of international crimes prosecution overwhelmed realist state interests – the extent to which rule enforcement was bearable, the extent to which ‘soft law’ was established to instrumentalize a Security Council-endorsed institution of justice. I conclude by considering how these dynamics changed over the court’s lifecycle.

Beginning in April 1994, amidst a civil war, the Hutu-led Rwandan government began targeted killings of ethnic Tutsi minorities and moderate Hutus. Approximately 800,000 people were killed. Linda Melvern traces the growth of Hutu antipathy towards Tutsi to the

19th Century Tutsi monarchy. The German colonialist Schutztruppe, whose invasions of northern Rwanda subordinated landowners, kinglets, and lineage heads to German occupation, supported the monarchy.[391] The seeds for the genocide were planted in the discontent Northern Hutu bore towards the Tutsi, and their southern Hutu supporters. Therefore, within the Hutu-Tutsi divide are geographic divisions between north and south.[392] Gerard Prunier argues that Rwanda's 1990 war produced a fundamentally ethnic, rather than geographic nature of genocide.[393]

While Malvern and others emphasize the ethnicized nature of the genocide, Mahmood Mamdani places greater emphasis on the need to 'contextualize'. Mamdani suggests that the key to understanding mass killings is through examining incidents in a historical context.[394] In the case of the ICTR, contextualization helps illuminate the interests of actors that designed and cooperated with the court. Mamdani identifies the need to link political outcomes more to political institutions than individual actors in order to explain the Rwandan genocide.[395] To do so, he firstly connects the genocide to the civil war, which had commenced in 1990. Merging and dissolving the genocide into the civil war removes the genocide's analytical existence, while severing it from the war would extinguish the motivation of killing, Mamdani observes.[396] When the genocide is viewed through this lens, Hutu and Tutsi are recognized as political identities and the genocide is identified as a

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[391] Linda Melvern, "*The Past is Prologue,"* in Phil Clark and Zachary Kaufman (eds.) *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*. London: Hurst, 2008, 23.
[392] Gerard Prunier. *The Rwandan Crisis: History of a Genocide*. New York: Columbia University Press, 1995.
[393] Ibid.
[394] Mahmood Mamdani. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. Princeton, N.J.: Princeton University Press, 2002, 268.
[395] Ibid.
[396] Ibid.

struggle for political power between these two political identities. Therefore, reconciliation between the two cannot occur without reorganizing political power.[397]

Mamdani's second cited consequence of contextualizing the truth is to consider the regional dynamic of an armed repatriation of Tutsi from Uganda to Rwanda by periodic ally, Yoweri Museveni.[398] The third consequence is to historically trace Tutsi power to Kigeli Rwabugiri's kingdom establishing Tutsi predominance in the late 19th century, and to the entrenchment and formalization of ethnically oriented class structures in the 1930s.[399] The fourth consequence Mamdani cites is the reconsideration of the racial lens through which historians view Rwandan citizenship, focusing academia upon identification of racial origins and migration.[400] Mamdani's fifth consequence of truth contextualization is to problematize the historical legitimacy and limitation of the subaltern ideological emergence of majority Hutu power in the 1959 revolution and accompanying massacres.[401]

A sixth consequence of contextualizing the truth distinguishes 'Hutu power' and 'genocidaire'. Hutu power accepted a Rwanda in which Hutu would enjoy equal status, usurping historical marginalization. However, 'genocidaire' refers to armed Hutu seeking to eliminate the Tutsi threat completely, a fear exaggerated by the RPF invasion.[402] John Shattuck, US Assistant Secretary of State for Democracy, Human Rights, and Labor from 1993 to 1994, acknowledged the RPF invasion's role in recruiting and motivating

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[397] Ibid.
[398] Ibid.
[399] Ibid., 269.
[400] Ibid.
[401] Ibid.
[402] Ibid., 270.

genocidaires.[403] A historical contextualization that informs the ICTR's design and function must also consider the historical geopolitical interests of States that held a prominent role in affecting the Court's design, function and case selection. This chapter attempts to introduce that context, as well as consider some of the economic and environmental dynamics that fermented extreme violence. This context informs my argument that the ICTR Statute constituted an advance for the norm of international crimes prosecutions against realist guarding of sovereignty costs and unforeseen consequences. It is the functional pressures, I argue, that eventually drove the norm cascade to contract facilitating a compromise of case selection independence and victor's justice.

Victor's Justice, rather than survivor's justice, is the final consequence of contextualizing the civil war cited by Mamdani. Victor's justice is where the losers of the last conflict prepare for the next. Survivor's justice rejects victory and defeat by seeking genuine political reconciliation. Both seek a different form of justice and a different form of State.[404] The nature of justice also informs the extent to which local and global actors are willing to accept case selection independence.

The utility of ethnicized narratives for those seeking political power also informs efforts to constrain case selection independence. The RPF that invaded Rwanda from Uganda in 1990 sought to tap into Tutsi marginalization. The RPF particularly cited the plight of Tutsi refugees who had fled Hutu terror campaigns that began after the 1959 overthrow of the Tutsi Monarchy. One of the Tutsi families that fled was that of Deogratius Kagame.

[403] John Shattuck, *Freedom on Fire: Human Rights Wars and America's Response*. Cambridge, MA: Harvard University Press, 2003, 66-67.
[404] Mamdani 2002 ,270.

Kagame was a descendent of Tutsi royalty, and father of six, the youngest of which was a three year-old named Paul Kagame.[405] The Kagame family fled to Uganda, where Paul Kagame grew up in the Nshungerezi refugee camp, before moving to Kampala for secondary school.[406] State sponsored massacres in Rwanda in 1963 reflected some of the elements of the Genocide in 1994. The massacres were prompted by a Tutsi invasion that cited ethnicized refugee discontents. They were also centrally planned with a minister responsible for elimination of Tutsi political leadership in each prefecture. The ministers employed propagandists that armed and encouraged Hutus to kill their Tutsi neighbors.

Paul Kagame had met fellow Tutsi exile Fred Rwigyema in Uganda, in the Nshungerezi refugee camp;[407] Kagame later joined Rwigyema in politically supporting Yoweri Museveni, Uganda's post-Idi Amin Defence Minister. They also supported Museveni's National Resistance Army (NRA) in 1981, after Museveni lost presidential elections to Milton Obote.[408] Museveni was of Hima origin and, therefore, related to Rwandan Tutsi.[409] As Obote began to persecute Rwandan refugees, Museveni, who had attended the same school as Kagame, formed a natural alliance with Kagame and Rwigyema and the Tutsi constituency.[410] Kagame and Rwigyema became the most senior Rwandan members of the

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[405] Colin M. Waugh. *Paul Kagame and Rwanda, Power, Genocide, and the Rwandan Patriotic Front* Jefferson, NC: McFarland and Company, 2004, 7-8.
[406] Ibid., 8-12.
[407] Stephen Kinzer. *A Thousand Hills: Rwanda's Rebirth and the Man Who Dreamed It*. Hoboken, NJ: John Wiley & Sons, 2008, 12.
[408] Waugh 2004, 20, 40.
[409] Johan Pottier. *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*. Cambridge: Cambridge University Press, 2002, 23.
[410] Ibid.

NRA – Kagame as head of Military Intelligence, and Rwigyema as Major General and Army Chief of Staff.[411]

The Hutu government in Rwanda confined tens of thousands of Rwandan Tutsi fleeing the Obote regime to heavily guarded camps in Rwanda's north.[412] After Museveni seized power in 1986, Ugandans, as well as Rwandan President Habyarimana began to express discontent with the high ranking of Rwandans in the Ugandan armed forces.[413] After Museveni responded by demoting Kagame and Rwigyema, the pair accelerated planning for armed re-entry to Rwanda.[414] In December 1987 the RPF was established by the Tutsi diaspora in Uganda, the Rwandan Alliance of National Unity (RANU). RANU agreed that it would be lead by NRA elements and that the struggle of Rwandan refugees would be armed.[415]

3.2 The Conflict

The planning of the genocide by President Juvenal Habyarimana's Hutu government began in 1990, shortly after the RPF invasion.[416] The Habyarimana government was confronted with large numbers of discontented, unemployed youth at the time. Environmental degradation had accompanied high population density in Rwanda rendering large swaths of young people unemployed, uneducated, and vulnerable to emotive and ethnically directed rhetoric. Youths were even more vulnerable to genocidal ideology as a consequence of the

[411] Waugh 2004, 40.
[412] Pottier 2002, 23
[413] Mamdani 2002, 175.
[414] Ibid.
[415] Ibid.
[416] Nina M. Serafino, *Military Interventions by U.S. Forces from Vietnam to Bosnia: Background, Outcomes and "Lessons Learned" for Kosovo*, Foreign Affairs, Congressional Research Service Report RL30184, Defense and Trade Division, updated May 20 1999, 22.

hierarchical structure of Rwandan society. Until the late 1980s, Rwanda, under Habyarimana had been relatively prosperous, enjoying health, educational and economic advance.[417] The trigger for sudden economic malaise was the June 1989 dismantling of the International Coffee Agreement (ICA) after US pressure on behalf of large US coffee traders.[418] As a consequence, prices for Rwanda's principal export earnings in tea and coffee plummeted. The export blow to Rwanda's economy was accompanied by World Bank imposed austerity, and a drought that exacerbated demographic and environmental pressures.[419] Rather than employ state coffers to ease economic pressures, Habyarimana reallocated 40 per cent of the national budget towards the military response to the RPF. These precarious economic circumstances lead to an International Monetary Fund (IMF) structural adjustment program that preceded a 40 per cent devaluation of Rwanda's currency, higher prices, higher taxes, and increased fees for basic social services.[420]

The economic malaise rendered French-supported Rwanda particularly vulnerable to attack by a Ugandan and US-supported armed group. The Hutu government did not only react in relation to Tutsi exiles in Uganda. The Hutu government had, in a confidential 1989 report, already identified the threat of attack by mainly Uganda-trained Tutsi exiles, from the DRC,[421] the Republic of Congo, Chad, the CAR, Gabon, and Cameroon.[422] The report

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[417] Jared Diamond. *Collapse: How Societies Choose to Fail or Succeed*. New York: Viking Press, 2005.
[418] Linda Melvern. *A People Betrayed: The Role of the West in Rwanda's Genocide*. London: Zed Books, 2000, 40.
[419] Diamond 2005.
[420] World Bank, *Rwanda Poverty Reduction and Sustainable Development*, Report no 12465-RW, Washington D.C., 1994, iii.
[421] Throughout this chapter, for the purpose of consistency, I use the name Congo, Democratic Republic of Congo, or DRC, in order to describe a State that from October 1971 to May 1997 was named Zaire. Any reference to 'Congo' refers to the DRC. Where I refer to the Republic of Congo, I do so using its full name.
[422] Melvern 2008, 24.

noted that the Rwandan army's weakness in the face of such a threat required the establishment of a civilian defence force manned by armed youths.[423]

On 1 October 1990, the RPF, tapping into discontent amongst an estimated 900,000 Rwandan refugees in Uganda, Burundi, Zaire and Tanzania, armed with Ugandan weaponry, and many dressed in Ugandan army uniforms, invaded Rwanda from Uganda.[424] Fred Rwigyema led the RPF invasion.[425] Prior knowledge of the invasion was denied by President Museveni, who later admitted to subsequent support of the RPF, which HRW claims included heavy weapons, including artillery, ammunition, food, logistics and intelligence.[426]

France interpreted the RPF attack as an Anglo-American incursion into the Francophone sphere of influence.[427] France, which sought to integrate former Belgian Great Lakes colonies into its sphere of influence, was a strong ally of Rwanda's Hutu government.[428] President Habyarimana was a close friend of Francois Mitterand, who had provided French troops, intelligence, communications, logistics and strategy support to the Rwandan Armed Forces (FAR).[429] France feared a domino effect for other areas of Francophone Africa were it to lose Rwanda.[430]

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[423] Ibid., 24-5.
[424] Melvern 2000, 26.
[425] Prunier 1995, 93.
[426] Mamdani 2002, 183; Melvern 2000, 26, 28.
[427] Peter Schraeder, "Belgium, France and the United States," in Gilbert Khadiagala (ed.) *Security Dynamics in Africa's Great Lakes Region.* Boulder, CO: Lynne Rienner, 2006, 169; Melvern 2000, 30.
[428] Schraeder 2006, 169.
[429] Waugh 2004, 47.
[430] Schraeder 2006, 170.

French support for the Habyarimana regime was swift. France had quickly sent 300 reinforcements along with arms to assist the French paratroopers already on the ground assisting the FAR.[431] External support appeared effective, initially. Fred Rwigyema was killed on the second day of the RPF invasion, as Congolese President Mobutu Sese Seko provided his elite forces to the FAR. France's status as primary patron of Rwanda aligned with Mobutu's historical support of Habyarimana and Hutu in both Rwanda and the DRC.[432] The French role was exaggerated by the withdrawal of Belgian support for Habyarimana's government.[433] Habyarimana would also successfully procure arms from Egypt, through soon to be Secretary General, and then long time friend of the Habyarimana government, Boutros Boutros Ghali.[434]

Another element that held back the RPF's initial attack was disunity among its leadership. Rwigyema had informed subordinate commanders Peter Banyingana and Chris Bunyenyezi that his strategy was to wait for the Hutu government to make mistakes and gradually accumulate support from the rural Hutu masses, de-ethnicizing the conflict.[435] Disagreement between this strategy and alternatively, a rapid advance towards Kigali, ended in Rwigyema's death.[436] Banyingana and Bunyenyezi then took over the RPF leadership. However, Museveni's brother, Salim Saleh, recalled the pair to Kampala,

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431 Waugh 2004, 47; Melvern 2000, 30. For a detailed account of the French role in supporting the Hutu government throughout the Genocide, see: Andrew Wallis. *Silent Accomplice: The untold story of France's role in the Rwandan genocide*. New York: St Martin's Press, 2007.
432 Howard French. "Ending a chapter, Mobutu cremates Rwandan ally," *New York Times*, 16 May 1997; Voltairenet.org, *Motives and methods of the implementation of the operation Noroit*, Reports from national and International Institutions classified by theme, December 1998.
433 Melvern 2000, 31.
434 Ibid., 31-2, 34.
435 Prunier 2008, 14.
436 Ibid.

where they were tried and executed for murdering Rwigyema.[437] Rwigyema had known Museveni since their involvement in the revolutionary movement in Mozambique in the 1970s.

During the RPF invasion, Paul Kagame was in training at Fort Leavenworth, Kansas in the US.[438] After hearing of Rwigyema's death, Kagame informed the US military that he would return to Uganda and join the RPF forces.[439] Upon his return, he found that the RPF had retreated to Uganda, under the observation of French spotter planes.[440] Kagame's return and assertion of control, indicates the close alliance that he, and the RPF, held with Museveni and the US. Ugandan and US support would prove instructive in advancing his interest of seizing control of government in Kigali. Kagame's return rescued a calamitous incursion for the RPF, which had been reduced to less than 2000 troops.[441] Kagame, re-launched the RPF into Rwanda in January 1991, developing a disciplined force of around 15,000.[442]

However, the Rwandan Army had also expanded in strength dramatically, from around 5000 to 28,000 men now equipped with heavy long-range artillery.[443] Over the two years subsequent to the RPF invasion, it is estimated that the government killed around 2000 Tutsi and detained a further 10,000 without charge.[444]

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[437] Ibid., 13-14.
[438] Waugh 2004, 47.
[439] Waugh 2004, 47.
[440] Melvern 2000, 30-1
[441] Ibid., 30.
[442] Ibid.
[443] Ibid., 33.
[444] Ibid., 36.

The RPF also adopted a Machiavellian culture in its infancy. Kagame's senior RPF officers protected Ugandan predominance within its ranks by eliminating young Francophone Tutsi, particularly those of Burundian decent.[445] The early shaping of the RPF would be hardened by the genocide, establishing an acceptance of instrumental use of violence, RPF massacres and operational and strategic ambivalence towards the security of Tutsi victims that many RPF combatants viewed as collaborators.[446]

Both parties' expansion in military capacity prevented predominance for either side. Key members at the Security Council that supported opposing parties pushed for negotiations and a peace agreement while continuing to support their local ally. Both parties, therefore, struggled to gain combatant cadre's support for peace. More extreme Hutu elements within Habyarimana's government, and particularly within the Rwandan Army were resentful of any peace negotiations.[447] In a December 1991 meeting, citing the 1959 Hutu 'revolution', Habyarimana issued a report to senior military personnel that labeled the Tutsi as the principal enemy inside or outside Rwanda along with any accomplice.[448] Army officers and local mayors continued to prepare 'genocidaires', particularly disenfranchised youth, to carry out killing directed at the government's opposition.[449]

In July 1992, under international pressure, Organization for African Unity-hosted peace talks began between the Rwandan government and the RPF. France, Belgium, Germany

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[445] Prunier 2008, 15.
[446] Ibid., 15, 19.
[447] Melvern 2008, 26.
[448] Ibid., 27.
[449] Melvern 2000, 39-45.

and the US held observer status.[450] A UN observer mission that attempted to bring calm to the fighting in the north accompanied the peace negotiations. The Arusha Accords were concluded in August 1993, providing for integration of the two forces, a transitional government and subsequent democratic elections providing governing power to parliament, not the presidency.[451] Kagame had refused inclusion of the Coalition for the Defence of the Republic (CDR) party in coalition government after it opposed the peace agreement.[452] The parties' post-Arusha behavior, particularly that of Habyarimana's government, indicated weak intent to abide by the Accords. Habyarimana's government subsequently made its largest arms deal with France, worth $12 million.[453] The arms were widely distributed to Hutu civilians. On 11 August 1993, shortly after the 4 August signing of the Arusha Accords, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions published a report indicating massacres of civilians and political assassinations that may already constitute genocide.[454] The UN Secretary General sent Under-Secretary-General for Political Affairs James Jonah to Burundi with a request that he inform Habyarimana that the Secretary General "had information that killings of the opposition were being planned, and that the United Nations would not stand for this."[455]

[450] Ibid., 52.
[451] Ibid., 53.
[452] Ibid., 53-55.
[453] Ibid., 55.
[454] Commission on Human Rights, Item 12, Fiftieth Session, *Report by Mr. B.W. Ndiaye. Special Rapporteur on extrajudicial, summary or arbitrary executions, on his mission to Rwanda from 8 to 17 April 1993*, Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, E/CN.4/1994/7/Add.1, Addendum, 22, para 78-81.
[455] UN, *Report of the Independent inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 15 December 1999, S/1999/1257, 9.

Some mass media organizations reported the genocide as spontaneous madness. It was, in fact, a well-planned government policy that sought to systematically exterminate Tutsi and sympathetic Hutu.[456] On 11 January 1994, UN Force Commander Lieutenant-General, Romeo Dallaire sent a cable to the Secretary General that was received by Under Secretary General Kofi Annan, which Annan stated he only 'saw later'.[457] The cable stated that a top-level contact had been asked by Habyarimana to use the interahamwe militia to provoke both the RPF and the Belgian peacekeepers facilitating confrontation with peacekeepers that would cause their withdrawal.[458] The informant was ordered to register all Tutsi in Kigali. He indicated his militia could kill 1000 Tutsi in 20 minutes.[459] Despite Dallaire's requests for authorization to seize weapons caches and deter potential massacres using force, the Security Council refused.[460] Ethnicized propaganda citing the Tutsi RPF threat mobilized Rwanda's unemployed and other Hutu elements against their Tutsi neighbors.[461] Politicians, the Rwandan army, and local militia coordinated the killing.[462] Localized propaganda, identification cards and roadblocks had already been used to kill more than 2000 Tutsi since 1990 with French support.[463] The events mirrored those Hutu killing of Tutsi in 1959 and 1963.[464]

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[456] Melvern 2008, 21; UN, *Report of the Independent inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 15 December 1999, S/1999/1257.
[457] UN, *Report of the Independent inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 15 December 1999, S/1999/1257, 10.
[458] Ibid.
[459] Ibid.
[460] Ibid., 10-14.
[461] Melvern 2008 , 25-6.
[462] Ibid., 21.
[463] Ibid..
[464] Ibid., 22.

On 6 April 1994, President Mwinyi of Tanzania, President Ntaryamira of Burundi and President Museveni reprimanded President Habyarimana for failing to honor the peace agreement.[465] Upon Habyarimana's return from the Tanzanian meeting, two missiles were fired at his plane, causing it to crash and kill all on board, including the Burundian president.[466] The assassination, which has never been conclusively solved, set off the Hutu elements in Rwanda's government intent on protecting power from the Tutsi threat.

The Hutu government set in motion the previously organized plan to kill political opponents and clearly marked civilian Tutsi. Large groups of unemployed youth and other extreme Hutu elements were mobilized, killing an estimated 800,000 Tutsi and moderate Hutu and Twa over the following three months. Kagame re-launched his forces from multiple fronts towards Kigali, encircling the city and cutting off supply routes.[467] The RPF took Kigali on 4 July 1994, and by late July forced Hutu 'Interahamwe' militia and other genocidaires to flee with refugee flows and French protection to the Eastern DRC.[468]

The genocide was of a staggering scale. However, the RPF also committed massacres. A United Nations High Commission for Refugees (UNHCR) study by consultant Robert Gursony, found that the RPF engaged in a campaign of killings that were organized and systematic.[469] Initially approaching RPF soldiers would appear friendly and cordial. However, a day or two later, the consultant was consistently told by interviewees across 41

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[465] Prunier 1995, 211.
[466] Ibid.
[467] Romeo Dallaire. *Shake hands with the devil: the failure of humanity in Rwanda*. London: Arrow Books, 2004, 299.
[468] Ibid., 420-480.
[469] Prunier 2008, 15-16; An alleged photocopy of the report can be found at Friend of the Congo's website.

of Rwanda's 145 communes, killer teams would arrive, assemble people for reconciliatory meetings and indiscriminately slaughter them.[470] Between early April and mid-September 1994, the RPF killed between 25,000 and 45,000 people, including Tutsi.[471] This fact was brought to the attention of then Secretary General Boutros Boutros Ghali who sent then assistant Secretary General Kofi Annan to Kigali where he briefed President Bizimungu and Vice President Kagame, providing them with the report.[472] HRW found that:

"When the team and the head of the UNHCR attempted responsibly to bring the information to the attention of the international community, the U.N. decided to suppress it, not just in the interests of the recently established Rwandan government but also to avoid further discredit to itself. The U.S., and perhaps other member states, concurred in this decision, largely to avoid weakening the new Rwandan government."[473]

A Hutu member of Kagame's cabinet wrote to him about the massacres, without official response or action.[474] The RPF's approach appeared to be one of non-ethnicized terror directed towards entrenching political control, rather than ethnic Tutsi predominance.[475] That view was supported by further killings in 1995 that focused upon friends and family of genocidaires, educated people, old Hutu, and apparent political opponents, all of whom

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[470] Prunier 2008, 15-16.
[471] Ibid., 16; HRW *Leave none to tell the story: Genocide in Rwanda*, 1999. UN Security Council, *Letter dated 28 July 2003 from the Secretary-General addressed to the President of the Security Council,* 29 July 2003, S/2003/766; Carla Del Ponte. *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*. New York: Other Press, 2009; Lars Waldorf, "*Transitional Justice: War Crimes Tribunals and establishing the rule of law in post-conflict countries: A mere pretence of justice: Complimentarity, sham trials, and victor's justice at the Rwanda Tribunal*," *Fordham Int'l L.J.* 33 (April 2010), 1221.
[472] Prunier 2008, 16.
[473] HRW, *Leave none to tell the story: Genocide in Rwanda*, 1999.
[474] Prunier 2008, 18.
[475] Ibid., 19-20; Mamdani 2002, 268-9.

presented a potential political alternative to the RPF.[476] The punitive consequence for these crimes has been described as ‘window dressing’, in that only those at the bottom of the social or military scale were prosecuted for unorganized acts of murder.[477]

3.3 US Engagement

Critical to the RPF’s confidence of its own impunity was the support of the US and the UK. The conflict continued to be viewed by humanitarian and political observers as “an old simmering issue between the Hutu majority and Tutsi minority that had manifest in a civil war”.[478] The 1993 peace agreement had driven Hutu government extremists to incite ethnic hatred using the radio station Radio Television Libre des Mille Collines (RTLM).[479] The ethnicized view omitted the struggle for political power in Rwanda that existed between local, regional and global actors. The RPF enjoyed the support of the US, UK, and Uganda, while the Hutu government enjoyed the support of France, the DRC, and to a diminishing extent, Belgium. The struggle between these two alliances was far more instructive as to the intervening behavior of the negotiating and supporting actors than their ethnicized, unaware, or otherwise ambivalent attitude towards the conflict.

In April 1994, as the genocide unfolded, President Clinton reported the deployment of combat US forces “consistent with the War Powers Resolution” to Burundi, to evacuate US personnel and citizens only.[480] Clinton’s action indicated US apprehension about

[476] Prunier 2008, 20.
[477] Ibid., 22.
[478] PBS Frontline, Interview with Michael Sheehan, former aid to US Ambassador to the UN Madeleine Albright, former staffer on the National Security Council of the George H.W. Bush administration.
[479] Melvern 2008, 23.
[480] Serafino 1999, 22.

engaging militarily in Rwanda – a position commonly explained by ignorance and public dissatisfaction with US loss of life where American interests were not in jeopardy.[481]

Then peacekeeping advisor to US Ambassador to the UN, Madeleine Albright, Michael Sheehan challenges this explanation. Sheehan contests the narrative that pure ignorance drove US inclination to constrain its response. His recollection firstly recognizes the genocide's unfortunate timing, very shortly after the March 1994 departure of US forces from Somalia, where local militia killed US servicemen in October 1993.[482]

Identifying a more realist US position, Sheehan also infers that the U.S. prioritized outright military victory for the RPF over peace negotiations, a power-sharing government, or intervention to stop the genocide. Sheehan states that as Kagame and the RPF marched south they made it clear to their US supporters that they were "determined to take power back in Kigali and they weren't interested in the UN coming back."[483] They stated, "they would oppose a UN force".[484] The RPF "saw a UN force as a force that would prop up the Hutu regime," impeding outright victory, and facilitating some kind of negotiation.[485] Sheehan asserts that the fact the RPF did not want a UN force "was crucial to US decision-making as to whether a force would go in and whether it would go in to Kigali."[486] Despite Kagame's hostility towards intervention at the time, he would later cite western non-intervention and Tutsi victimhood as justification for, and to deflect criticism of, autocratic

481 Walter Clarke and Jeffrey Herbst, "Somalia and the Future of Humanitarian Intervention," Foreign Aff. 75(70) (1996).
482 PBS Frontline, 2004.
483 Ibid.
484 Ibid.
485 Ibid., David Scheffer. *All the missing souls: A personal history of the war crimes tribunals*. Princeton, NJ: Princeton University Press, 2012, 62.
486 PBS Frontline, 2004.

behavior.[487]

The more realist RPF and American positions would also instruct their approach towards a tribunal – a tribunal the RPF began seeking before they took power. The RPF delegate to the UN, citing the Holocaust, circulated a list of around forty-five people for prosecution while the genocide was still ongoing.[488] The geopolitical self-interest of the US and the RPF was accompanied by the reluctance on the part of western States to put troops into Rwanda, particularly at a time when Belgian troops had withdrawn. While waiting for the RPF to take Kigali, the Department of Defense reviewed past peacekeeping operations while opposing lower-level elements in the State Department that were pressing for non-enforcement, observer-only intervention. The Secretary of State, Warren Christopher, and the Whitehouse viewed Rwanda as a small country of insufficient strategic significance for troops to be deployed, particularly after Somalia.[489] When the Clinton administration Chief Human Rights officer communicated that he had observed bodies flowing down the Kagera River at a rate of ten per minute, he was informed that his description, using the word 'genocide' and calls for action disgruntled elements within the administration.[490]

As the genocide unfolded and was communicated to the US government, the US pushed for full UN peacekeeping withdrawal.[491] They opposed a New Zealand-led resolution

[487] Victor Peskin. *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Cambridge: Cambridge University Press, 2008, 210.
[488] Zach Kaufman, Academic, George Washington University, 10 November 2012, Washington, USA, interview n°78
[489] John Shattuck. *Freedom on Fire: Human Rights Wars and America's Response*. Cambridge, MA: Harvard University Press, 2003, 49-51.
[490] Ibid., 49, 55.
[491] Scheffer 2012, 46-58.

calling for peacekeeping deployment.[492] By the end of April, the UN estimated that 100,000 people had been killed, the International Committee of the Red Cross (ICRC) estimated between 100,000 and 500,000, and the UN secured US support for a UN mission to investigate the massacres.[493] The Security Council, despite the corroborated reports of ethnically directed mass killing, were reluctant to use the term genocide, which would require some action under the Genocide Convention.[494] A historically contextualized interpretation of Security Council inaction supports explanations of geopolitical self-interest on the part of competing P5 states. At the same time, no western States wished to put their troops into Rwanda. The slaughter had to continue until the RPF seized Kigali. On 17 May the Security Council finally passed a version of the resolution proposed by the Czech Republic and New Zealand. The resolution mandated a 5,500 United Nations Mission for Rwanda (UNAMIR) force only to "secure humanitarian areas" and not to secure Kigali or facilitate the return of parties to the Arusha Accords.[495] The US Department of Defense impeded the resolutions' implementation by delaying supply of the fifty armored personnel carriers the Africa-provided troops needed.[496]

Explanations of realist self-interest at the expense of pressure to protect norms of international humanitarian law compliance were also supported by French behavior. The characterization of the violence as the spontaneous flaring of ancient tribal hatred allowed France to preference its client regime's control of political power ahead of a negotiated

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[492] Colin Keating, Former New Zealand Ambassador to the UN, 29 September 2011, via phone, interview n°91.
[493] Scheffer 2012, 61-2.
[494] Ibid., 64, citing William Schabas. *Genocide in International Law*. 2nd ed. New York: Cambridge University Press, 2009, 520-592.
[495] UN Security Council, *Security Council Resolution 918 (1994),* 17 May 1994, S/RES/918, 3.
[496] Shattuck 2003, 54.

conclusion.[497] France began a UN-backed two-month, 2,300-strong military relief mission called *Operation Turquoise,* in June 1994.[498] The French operated largely in southwestern Rwanda, where they established a protected zone that barred entry of the RPF but allowed entry for Hutu genocidaires.[499] The zone sheltered one million people by mid-August when an RPF military victory was clear and France announced its troops would pull out. The zone did little to protect refugees fleeing the genocidaires.[500] When the RPF captured the capital, Kigali on 4 July 1994, it established itself as the government. Most importantly, ranking RPF officers became officers in the Rwandan Army. It was these officers that Kagame relied upon for support in the political sphere and in asserting control over Rwandan and eastern Congolese territory.[501]

On 31 July, the US/RPF relationship was entrenched via a visit by US Secretary of Defense, William Perry, to Paul Kagame in Kigali.[502] The Defense Department's strategy to oppose even a "permissive intervention" in the genocide until the RPF had taken control of the Rwandan government appeared to have now secured that objective.[503] The US subsequently dispatched supporting military personnel.[504] By mid-August, as the French pulled its troops out in defeat, the U.S. had 3,600 military personnel involved in the

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[497] Tom Ndahiro, "Genocide-laundering: Historical revisionism, genocide denial and the role of the Rassemblement Republicain pour la Democratie au Rwanda," in Phil Clark and Zachary Kaufman (eds.) *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*. London: Hurst, 2008
[498] Serafino 1999, 22
[499] Ibid.
[500] Ibid.; Jennifer Welsh, "The Rwanda Effect," in Phil Clark and Zachary Kaufman (eds.) *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*. London: Hurst, 2008
[501] Del Ponte 2009, 183.
[502] US Department of Defense photograph, depicting US Secretary of Defense, William Perry meeting with Rwandan RPF leader, Paul Kagame on 31 July 1994.
[503] Shattuck 2003, 48-9.
[504] Serafino 1999, 22.

mission. While initial plans required those personnel to operate in Kigali, the majority of personnel were deployed in the eastern Congo.[505] Although not officially recognizing the RPF government, the US deployed troops to protect Kigali airport.[506]

The camps US troops were protecting in eastern Congo had received an estimated 850,000 Rwandans, mostly Hutus, of the estimated two million who had fled to neighboring countries.[507] By December of 1996, the US would be documenting ongoing RPF (then the Rwandan Patriotic Army) abuses in the Eastern Congo by the militia they supported.[508] The impunity Kagame enjoyed in Washington was evident in September 1996 complaints he made to US officials. Kagame demanded that the UN Office of the High Commissioner for Human Rights, which had cited reprisal killings of Hutus be re-focused on crimes against Tutsi refugees and genocide survivors.[509]

3.4 Court Design

On June 15 1994, US Ambassador to the UN, Madeleine Albright recommended that the US government seriously examine proposing UN action to prosecute those responsible for crimes in Rwanda.[510] The political hurdles to establishing ICTR were diminished by the pre-existence of the ICTY.[511] Critically, significant political capital had already been spent

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[505] Ibid.
[506] Ibid.
[507] Ibid.
[508] US Subcommittee on House International Operations and Human Rights of the House of Representatives Committee on International Relations, Hearing on Refugees in eastern Zaire and Rwanda, Statement of Phyllis E. Oakley, Assistant Secretary of State, Bureau of Population, Refugees and migration, US Department of State, 4 December 1996, 6, 18.
[509] Shattuck 2003, 72.
[510] Scheffer 2012, 69.
[511] Michael Matheson, Former Principal Deputy Legal Adviser to US Ambassador to the UN 1990-2000, 8 January 2013, via telephone, interview n°15.

to persuade P5 states of the idea of resurrecting international justice, and the Chapter VII-role of the Security Council in doing so.[512] The Yugoslav situation, because of its greater significance for P5 members, required far greater political persuasion than the ICTR.[513]

Impetus for the tribunal was claimed by New Zealand's UN mission, which concluded that an appropriate governmental response was to create a tribunal to act as a deterrent but to also ensure accountability.[514] The US engaged New Zealand as a State of "relatively good and non-confrontational reputation" to play a prominent role in introducing the concept that it had driven.[515] Ambassador Albright suggested three options. The first was a new and separate ad-hoc tribunal for Rwanda that would be "time consuming and involve considerable resources."[516] The second option was to extend the jurisdiction of the ICTY to include crimes committed in Rwanda. That option was viewed as an expeditious way to "blunt criticism of earlier US reluctance to recognize that acts of genocide have taken place," but also as potentially disruptive to an infant ICTY.[517] The third option was to await the establishment of an international criminal court that would unlikely hold retrospective jurisdiction over crimes committed in Rwanda in 1994.[518] The US sought to demonstrate leadership on the prosecution of crimes by calling for a tribunal[519] – a strategy that would also lend control over the agenda-setting stage of the Court's design.

New Zealand, accompanied by Spain, Argentina, and the Czech Republic co-sponsored a

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[512] Ibid.
[513] Ibid.
[514] Keating, 2011.
[515] Matheson, 2013.
[516] Scheffer 2012, 69.
[517] Ibid., 70.
[518] Ibid.
[519] Ibid.

resolution on a commission of experts to investigate evidence of grave violations of international humanitarian law, including genocide.[520] The resolution stated that:
"all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice"[521]

The resolution expanded the crimes of concern from that of the 17 May 1994 resolution that cited only the "killing of members of an ethnic group with the intention of destroying such a group, in whole or in part" as a crime punishable under international law.[522] Unlike the May 1994 Resolution, the July resolution did not specifically request information on "responsibility for the tragic incident that resulted in the death of the Presidents of Rwanda and Burundi".[523]

The US government made clear its enthusiasm for an international tribunal for Rwanda that reflected, or was in some way combined with the ICTY.[524] The US assisted in staffing the Commission, funding it, and applying pressure to the French government to cooperate, including on providing information.[525] The US was concerned that France would block moves to establish a tribunal for Rwanda in order to diminish its own role or the role of those it supported.[526] The French government's enthusiasm for a tribunal grew as it became concerned that were an international court not established, the government of

520 UN Security Council, *Security Council Resolution 935 (1994),* 1 July 1994, S/RES/935..
521 Ibid.
522 UN Security Council, *Security Council Resolution 918 (1994),* 17 May 1994, S/RES/918..
523 Ibid.
524 Scheffer 2012, 71.
525 Ibid.
526 Matheson, 2013.

Rwanda would create one – a court that might attempt to attach criminal liability to French actors for the crimes committed.[527]

As the Security Council's most powerful actor, the US led the design of the Court. Their first consideration addressed how the culprits might be apprehended, particularly when many were outside Rwanda.[528] A Security Council chapter VII entity could arrest accused. However, State cooperation was already a concern for designing actors who feared the security consequences of a peacekeeping force mandated to arrest suspects.[529] In considering questions of suspect identification and apprehension, the State Department relied on the Commission of Experts' findings and those of the HRW expert.[530] Both parties to the conflict also provided information incriminating one another, despite the RPF's short time in government and the former Hutu government's dispersed and exiled nature.[531]

Before a Security Council resolution establishing the tribunal was presented, the US government was already asserting control over case selection. The State Department tapped its intelligence services to locate accused and draft a list of leading suspects for Interpol arrest warrants, despite the absence of any jurisdiction for doing so.[532] The US focused solely on the Hutu party to the conflict.[533]

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[527] Scheffer 2012, 72.
[528] Ibid.
[529] Ibid., 72-3.
[530] Ibid., 75.
[531] UN Security Council, *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council*, 4 October 1994, S/1994/1125, 11, para 37.
[532] Scheffer 2012, 75.
[533] Ibid.

The primary P5 member that opposed the Court was China, which was concerned that the tribunal's were becoming far 'too easy to build'.[534] Russia, while preferring not to allow another tribunal, was particularly opposed to an expansion of the ICTY. Russia was deeply skeptical of the ICTY, given the extent to which it had facilitated NATO encroachment into the former Soviet sphere of influence and prosecution of Russia's Serb allies.[535] Russia preferred the Nuremburg approach of prosecuting the higher-level offenders and allowing Rwanda to deal with the lower-level offenders.[536] However, the normative power of international crimes prosecution, combined with the comparative weakness of Russia and China at the time rendered them unwilling to use a veto to obstruct the creation of a court.

France also preferred a separate Court for Rwanda, but cited the need to avoid the risk of the ICTY expanding to become a de-facto international criminal court, lending sole discretion to trigger jurisdiction to the Security Council.[537] France, as a P5 state, would retain greater power through a Security Council dominated international court. Its position may indicate the power over France of the compliance pull of the norm of international crimes prosecution.

However, there also appeared to be a high level of outcome uncertainty associated with proposed court models. It did not appear that any state had an adequate grasp of the

[534] Ibid., 73.
[535] Keating, 2011; Scheffer 2012, 77.
[536] Scheffer 2012, 73.
[537] Ibid., 74.

consequences of a particular model.[538] A US draft resolution was circulated on 31 August 1994. France and Spain supported the Russian position of two separate tribunals, while China, Rwanda, other African States, the ICTY prosecutor and the UN Special Rapporteur on Rwanda supported the consolidated version.[539] The interests of the various actors did not appear to neatly align with their positions.

New Zealand put forward a resolution that compromised between the Russian and US position. While New Zealand claim the responsibility for establishing the court, the US has also asserted that a tribunal for Rwanda was its initiative, and that they ensured it moved through the Security Council.[540] The final resolution provided for a tribunal that shared the ICTY Appeals chamber and prosecution but established an ICTR registry and trial chamber separate from ICTY.[541] The resolution was circulated on 29 September, before the Commission of Experts Report was presented on 1 October 1994. The US Embassy in Kigali already knew the Commission of Experts they funded would recommend an international war crimes tribunal.[542] This was the first indication of US capture of the design process.

The fact that both parties to the conflict had "perpetrated serious breaches of international humanitarian law" and "crimes against humanity" was made clear by the Secretary General

[538] Matheson, 2013
[539] Scheffer 2012, 77.
[540] Zachary D. Kaufman, "The United States Role in the Establishment of the United Nations International Criminal Tribunal for Rwanda," in Phil Clark and Zachary D. Kaufman (eds.) *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond.* London: C. Hurst & Co, 2008, 229-60, 230.
[541] Scheffer 2012, 79; Keating, 2011.
[542] Scheffer 2012, 77.

in a 1 October 1994 letter to the Security Council.[543] The Commission requested that those responsible for all acts cited be brought to justice before an "independent and impartial international criminal tribunal".[544]

At a time of unambiguous US economic and military predominance in the global order, the US government sought to advance its interests through the Security Council, where adversaries were not in a position to seriously or significantly oppose it. The State Department viewed the establishment of another Tribunal as an opportunity to "expand the exercise of authority of the Security Council to deal with these [atrocity in armed conflict] problems."[545] The US favored seating the tribunal in The Hague to gain economies of scale, while hosting some sittings in Kigali, Nairobi or elsewhere in the region.[546] The fact that the US government was considering Kigali as a location indicated it was content with potential compromise of the Court's independence by its local ally, the RPF. Russia, China and France were not happy with the proposed geographic jurisdiction of the court extending to crimes committed in neighboring countries.[547] France facilitated the escape of many genocidaires they had armed into Eastern Congo where they carried out crimes. Including those crimes would further expose France to potential embarrassment, or even culpability. Russia and China in particular have long sought to advance the interests of State sovereignty – a principle China has long been sensitive towards.[548] In a post-Cold

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[543] UN Security Council, *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council*, 4 October 1994, S/1994/1125, 30.
[544] UN Security Council, *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council*, 4 October 1994, S/1994/1125.
[545] Matheson, 2013; Michael Matheson. *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues After the Cold War*. Washington, D.C.: US Institute of Peace, 2006.
[546] Scheffer 2012, 79.
[547] Ibid.
[548] Li Anshan, "China and Africa: Policy and Challenges," *China Security* 3(3) (Summer 2007), 69 - 93, 74.

War environment, the position of the US, particularly when supported by the UK and other non-P5 members, allowed it to coerce compliance from eastern P5 powers. However, then deputy legal advisor to the State Department, Michael Matheson also noted: “one thing no one (including the US) had the energy to try to tackle was the Congolese situation.”[549] The US and other Council members were in broad agreement that although the tribunal’s jurisdiction might stretch to other States, it should only do so in relation to crimes surrounding the genocide.[550] There was still a degree of apprehension about the tribunals. The ICTY had only just been established and Council members were unsure as to whether it would succeed.[551] Unlike the ICTY, the Rwandan government had an interest in the tribunal’s establishment, making some Security Council members more confident of ICTR success.[552] The enormous scale of the offending, and the daunting prospect of prosecuting it, let alone the unfolding conflicts in surrounding territories, caused the US government to seek temporal jurisdiction limited to the period surrounding the genocide.[553]

3.5 Rwanda at the Security Council

Rwanda’s role in the design of the ICTR was exaggerated by the fact it held a seat on the Security Council. Schabas cites the RPF government’s attitude towards criminal justice as being one that confronts perceptions that Africans prefer rapid reconciliation and forgiveness to prolonged criminal justice.[554] The RPF government formerly requested a

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549 Matheson, 2013.
550 Ibid.
551 Ibid.
552 Ibid.
553 Ibid.
554 William Schabas, “Post-genocide Justice in Rwanda: A spectrum of options” in Phil Clark and Zachary Kaufman (eds.) *After genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond*. London: Hurst, 2008, 207.

tribunal be established on 28 September 2012.[555] The RPF government demonstrated enthusiasm for a credible commitment to international crimes prosecution. However, Rwanda also demonstrated clear intent to limit the sovereignty cost of an international tribunal, to retain jurisdictional control, or at least to limit uncertainty over case selection. The RPF government indicated this intent through its assertion to the US government that it maintained discretion to preference domestic trials. The Rwandan delegation informed then senior advisor to the US Ambassador to the UN, David Scheffer, that: "we don't want to miss this opportunity"… "we could have gone unilateral, but we came to you".[556] A committee of loyal RPF officials, including Kagame, formulated the Rwandan position from Kigali.[557] A former US Department of State senior legal officer, suspected that Rwanda's government "wanted to control this operation because they probably were afraid of the possibility that it might get out of control and start indicting all of them."[558]

A consultant to the US government on the ICTR design noted the Rwandan preference for a tribunal "operating in Rwanda, but working with the government. They did not want an independent organization that they saw as being in opposition."[559] The RPF government also had concerns that France, who they thought should be in the dock, might affect either case selection or the success of a case by influencing the tribunal's design or function.[560]

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[555] Schabas 2008, 209-10.
[556] Scheffer 2012, 81.
[557] Ibid.
[558] Matheson, 2013.
[559] Richard Goldston, Chief Prosecutor, ICTR, 20 May 2013, Florence, Italy, interview n°103.
[560] Kaufman, 2012.

While the Rwandan positions below indicate the RPF government's realist intent, their capacity to obtain that intent was severely undermined by their weak bureaucratic capacity. During Security Council negotiations, the Rwandan delegation was often left awaiting instructions from Kigali as other states confirmed their positions.[561] The lag in communication caused by Rwanda's scarce bureaucratic resources often left Rwanda's delegation behind discussions and unable to assert Rwandan interests to the extent it might have.[562]

Rwanda insisted on a role determining what constituted first tier cases before the ICTR, and what constituted second tier cases to be tried domestically.[563] The RPF government sought to exclude itself from ICTR jurisdiction by suggesting criteria that placed those most directly responsible for genocide only in tier one, and those directly responsible for killings in tier two.[564] Maintaining subtle case selection control while presenting itself as delegating a sensitive power – that of prosecuting crimes – would allow the RPF government to dilute conceptions that prosecutions were vengeful, rather than independent. The US officially viewed provision of such discretion to the Rwandan government as challenging the court's independence.[565] Rwandan discretion would also have diminished the discretion of the Security Council and its P5 members, including the US. The Rwandan preference for a right to filter ICTR cases was not one the Security Council took seriously.[566]

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[561] Ibid.
[562] Ibid.
[563] Scheffer 2012, 74.
[564] Ibid.
[565] Ibid.
[566] Keating, 2011.

The RPF government made other proposals that would exclude RPF crimes from ICTR jurisdiction. The first related to the Court's temporal jurisdiction. The Rwandan government preferred temporal jurisdiction beginning on 15 November 1992 and ending in July 1994.[567] A July 1994 conclusion includes the genocide but not "extensive evidence of systematic killings and persecution, in some cases as recently as early September, of Hutu individuals by the RPF army."[568] However, the Commission of Experts also cited RPF killing of 102 persons within the Kigali prefecture during April to June of 1994.[569] The early commencement of temporal jurisdiction would also have focused the tribunal on Hutu preparation for genocide, as well as Hutu pre-1994 massacres. Rwandan enthusiasm for emphasizing pre-genocide behavior was evident in a Rwandan suggestion of temporal jurisdiction dating back to 1990.[570] Most importantly, the RPF government preferred the exclusion of post-genocide (post-July 1994) crimes it had committed – a position it was prepared to relinquish earlier temporal commencement to achieve.[571] The US, indicating deference to the international crimes prosecution norm and the extended nature of the ICTY's temporal jurisdiction, asserted that it was premature to expect a concluding date to the tribunal's temporal jurisdiction, particularly given the potential for recurrence of crimes.[572] US reluctance to take the same position as Rwanda on temporal jurisdiction suggests its preference of case selection independence and a focus on the entirety of the period of most serious offending. That position was formed despite the realist concern of

[567] Scheffer 2012, 79.
[568] UN Security Council, *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council*, 4 October 1994, S/1994/1125, 9; Matheson, 2013.
[569] UN Security Council, *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council,* 4 October 1994, S/1994/1125, 19.
[570] Kaufman, 2012.
[571] Ibid.; Scheffer 2012, 81.
[572] Scheffer 2012, 80.

the consequences for its client, which sought "limited time frame focusing on the period in which they had been the object of the genocide."[573] Other Security Council members were content with a temporal jurisdiction of 1 January 1994 to 31 December 1994, despite Rwanda's objections.[574] Rwanda's concerns would prove instructive to its decision to vote against the ICTR's founding.[575]

The RPF government also attempted to exclude its members by requesting ICTR jurisdiction be limited to that of Genocide, excluding war crimes.[576] Again, the US informed Rwanda that it would not exclude other violations of international humanitarian law. However, the US did concede to emphasize genocide by placing it first in the tribunal's Statute.[577] Rwanda then sought to align the purpose behind crimes against humanity to genocide, thereby excluding non-genocidal crimes committed by the RPF. The US partially conceded. It described crimes against humanity, as under Article 3, as falling under the tribunal's jurisdiction only when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[578] Despite Rwanda's peripheral influence at the Security Council, it was at least able to signal to a tribunal's prosecutor, that it would need to show that RPF crimes against humanity were either widespread or systematic. It is not clear if a prosecutor would also associate this signal with other crimes in the ICTR's statute, including violations of Article 3 common to the Geneva Conventions as per Article 4,

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[573] Matheson, 2013.
[574] Scheffer 2012, 81.
[575] Ibid., 83.
[576] Ibid., 79; UN Security Council*, Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council*, 4 October 1994, S/1994/1125, 19.
[577] Scheffer 2012, 80.
[578] Article 3, ICTR Statute.

where the 'widespread or systematic' language is not present.[579] The most forceful jurisdictional constraint the RPF government sought was to provide Rwandan courts primacy over the ICTR.[580] Primacy would allow the Rwandan government to subject RFP officers to weak domestic criminal processes rather than the ICTR. The US persuaded the Rwandan delegation that the primacy of the international tribunal was necessary for the Court's integrity.[581]

The RPF government also hoped to use the ICTR as an instrument to stigmatize and isolate from Rwandan politics, members of adversarial political groups. It sought to endow the tribunal with the discretion to find groups, as well as individuals criminally responsible. This would have allowed incrimination of any member of the Hutu National Police, the Coalition for the Defense of the Republic (CDR), Democratic Republican movement, or the interahamwe.[582] The Security Council rejected the proposal.

The RPF government also attempted to assert functional control over the ICTR, while diminishing the functional influence of adversaries. Rwanda's proposal of Rwandan judges met strong opposition within the Security Council, which cited the great potential for bias.[583] Rwanda also made the argument that France, through the Security Council, should not play a role in the election of judges or other staff.[584] The government demanded that the tribunal be located in Rwanda, citing 'the problem' of witnesses and evidence.[585]

[579] Article 4, ICTR Statute.
[580] Scheffer 2012, 79.
[581] Ibid., 82.
[582] Ibid.
[583] Ibid.
[584] Kaufman, 2012.
[585] Ibid.; Barbara Crossette. "Rwanda Asks Quick Start Of Tribunal," *New York Times*, 9 October 1994.

Rwandan court location would facilitate government monitoring of Court personnel and function, control of personnel movement and if required, impediment of Court function by prohibiting the participation of witnesses or access to visas of court personnel. In short, it would allow the Rwandan government the option to shut the court down. The government accepted locating the administrative seat of the tribunal outside Rwanda, but insisted that the trials should take place within Rwanda. That proposition was not accepted.[586] A final attempt to procure means to diminish the threat of prosecution was the government's demand that convicted persons be jailed in Rwanda.[587] Incarceration in Rwanda would allow the government enormous discretion as to convicts' conditions. Those of political expediency could be placed in overcrowded prison systems while allies and collaborators could be provided home detention or other diluted forms of imprisonment. Control of imprisonment would mitigate the political damage to the RPF government were one of their own to be prosecuted. The need for an international standard of detention would also help procure funds for justice sector reform within Rwanda. While the Security Council granted Rwanda the right to incarcerate accused, ICTR judicial discretion was to be applied on a case-by-case basis.[588] By 2010, no persons convicted by the tribunal were imprisoned in Rwanda.[589]

A final, purely ideological RPF demand of an international tribunal was the tribunal's discretion to hand down the death penalty.[590] The Rwandan delegation was particularly assertive about the death penalty's inclusion in the statute, a position that European, Latin

[586] Scheffer 2012, 80.
[587] Ibid., 79.
[588] Ibid., 82-3.
[589] Ibid., 83.
[590] Keating, 2011

American and New Zealand members would not countenance.[591] The death penalty, along with the temporal jurisdiction of the Court, and its primacy caused Rwanda to vote against the enabling resolution.[592] The ICTR's original prosecutor, Richard Goldstone, viewed the short temporal jurisdiction and the absence of the death penalty as exacerbating factors for the Rwandan government. Goldstone saw the politically instrumental elements such as jurisdiction over crimes, and court location as most instructive to the Rwandan's decision to vote against the enabling Security Council resolution.[593] A former senior ICTR-OTP member similarly notes of Rwanda's primary motivation: "They wanted it in Kigali, and they wanted to control it."[594]

On 8 November 1994, citing the preliminary report of the Commission of Experts and acting under Chapter VII of the UN Charter, the Security Council passed resolution 955, establishing the ICTR.[595] As agreed, the ICTR assumed jurisdiction over persons of any nationality responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994".[596]

As stated above, the statute listed the crime of genocide (Article 2) before crimes against humanity (Article 3) and violations of Article 3 common to the Geneva Conventions and

[591] Ibid.; Scheffer 2012, 80; Matheson, 2013.
[592] Scheffer 2012, 83-4.
[593] Goldstone, 2013.
[594] Matheson, 2013.
[595] Article 4, ICTR Statute.
[596] Ibid.

of Additional Protocol II (Article 4).[597] The Court's personal, territorial and temporal jurisdiction reflected the simplistic narrative of the conflict as genocide, an ideological mass crime, and not a power struggle in which both parties, but one party predominantly, disregarded international humanitarian law in seeking control of government. The Court's jurisdiction over all persons for crimes committed in Rwanda included those actors that planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of any of the crimes referred to above.[598] The breadth of jurisdiction over persons includes those persons that armed both warring parties, including Ugandan and French government actors, as well as actors in the private sector. The temporal jurisdiction includes crimes committed during the genocide, crimes committed in Rwanda by the either party post-genocide, crimes by either party in the Congo, and crimes by Rwandan nationals in the NRA or LRA in Uganda.[599] Temporal, geographic and personal jurisdiction provided jurisdiction over crimes connected to the genocide, particularly in the eastern Congo in 1994. However it placed beyond the Court's reach associated or unassociated crimes committed by Congolese, Ugandan, or other nationals outside Rwanda in the calendar year of 1994. Territorial, temporal and personal jurisdiction also excluded crimes by genocidaires or RPF personnel inside and outside Rwanda, outside of 1994.

Article 8 of the Statute provides the ICTR primacy over Rwandan courts, including the right to try a person already tried before Rwanda's national courts if national proceedings are not impartial or independent, or were designed to shield an accused from international

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[597] Ibid.
[598] Ibid.
[599] Ibid., Article 7.

criminal responsibility, or if the case was not diligently prosecuted. Article 8 speaks to the Security Council's concern as to the intent behind the RPF government's demand for the supremacy of Rwanda's national courts.

The Statute provides the Security Council discretion to select between twelve and eighteen candidates from a large list of candidates made up of two nominations from each State. The UNGA then elects six of the nominees.[600] The Statute provides for a nomination process of significant independence that does, however, provide primary candidacy-filtering power to the Security Council.

Article 15 speaks to the role of the prosecutor. Despite the prioritization of genocide as the first of the Statute's crimes, and the indication of the requirement that crimes against humanity be widespread or systematic and specifically targeted, the Statute does not provide specific or philosophical case selection direction. Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, therefore, remain completely undirected and, legally, of the same prosecutorial priority as the other crimes in the Statute.

The Statute provides the prosecutor the power, supported by Chapter VII of the UN Charter, to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations, with if required, the assistance of States.[601] The Statute provides discretion to the prosecutor to pursue the leadership and supporters of violations of international humanitarian law. It requires that the prosecutor act independently and

[600] Ibid., Article 12 (3).
[601] Ibid., Article 17 (2).

compels cooperation from States, but recognizes that evidence triggering investigations may come from governmental, non-governmental or inter-governmental actors, as well as from the prosecutor's ex-officio initiative.[602] Article 15 (2) specifies that the prosecutor shall "act independently" and "shall not seek or receive instructions from any Government or from any source."[603] The Statute, therefore, establishes a prosecutor, with independent discretion, but significantly dependent on State cooperation.

3.6 Learning as we go: Implications of investigation during continued instability

The prosecutor of the ICTR is also the prosecutor of the ICTY. The court's first prosecutor was Richard Goldstone, a South African Judge who had never practiced as a prosecutor, had no understanding of international humanitarian law, and knew nothing about Yugoslavia or Rwanda.[604] The selection of the ICTY prosecutor had been fiercely contested. State agreement that a unanimous Security Council decision was required for the prosecutor's election indicated State concern as to potential unforeseen consequences.[605] A senior ICTR-OTP member describes Goldstone's election as one in which a global statesman, Nelson Mandela, appeared to be the only person with the clout to support someone that others would not vote down:

"Between January and June, the Security Council vetoed eight nominees of Boutros Ghali for prosecutor. Five were vetoed by Russia, the UK vetoed Bassiouni because he is a Muslim – they thought that it was inappropriate to have a Muslim prosecutor because of

[602] Ibid., Article 17 (1).
[603] Ibid.
[604] Goldstone, 2013.
[605] Scheffer 2012, 31.

Bosnia. Pakistan was on the Security Council. Pakistan vetoed Soli Sorabjee, the Attorney-General of India and they vetoed a Scot in retaliation for the UK vetoing a Muslim. The judges were at the point of resigning en masse. Cassesse (the ICTY President) was desperate. He went to a conference in Paris and met Roger Errera, a senior member of the Counceil d'etat at the time, a well-known human rights activist and Errera said, 'you know, you want to avoid any further problems, get somebody in South Africa who Mandela would support…' Mandela had just been, in May, appointed President, nobody on the Security Council would dream of going against a Mandela-supported appointee."[606]

Goldstone was about to decline the position due to his lack of relevant experience and the opportunity to sit on South Africa's constitutional court. However, Mandela instructed him to take the position, informing Goldstone that his Supreme Court seat would be kept available for his return in two years time.[607] The prosecutor was lent a high degree of functional independence by the Court's statute. The Security Council seated the court in Arusha, Tanzania.[608] Arusha is only around ten hours by road or an hour by plane from Kigali, but is in a comparatively stable part of Africa. The ICTR's chapter VII investigative powers and seat external to Rwanda, was accompanied by guaranteed funding through an assessed share of the UN budget.[609] The assessed contributions system would prove effective in ensuring that the ICTR enjoyed a substantial budget. The Court, between 1995 and 2007, was provided over $1 billion. The budget for the fiscal year 2006-2007

[606] Goldstone, 2013.
[607] Ibid.
[608] UN Security Council, *Security Council Resolution 977 (1995),* 22 February 1995, S/RES/977 (1995).
[609] Steven Roper and Lilian Barria, "Funding institutions of human rights: Do international tribunals provide good value?" Annual meeting of the American Political Science Association, Washington D.C., 1–4 September 2005, 1.

was over $250 million.[610] Despite these structural pillars of functional independence, prosecution dependence on State cooperation was immediately apparent. The ICTR 's primary supporter, the US, began capacitating prosecution investigations. Goldstone sought voluntary financial assistance despite the potential compromise to his independence.[611]

During the months subsequent to the enabling resolution, the US government provided $1 million to establish initial offices in Kigali and Arusha, and to finance initial investigative work.[612] The US also provided prosecution investigators with reports and other information it had provided to the Commission of experts.[613] The US also drafted proposals for investigative access to refugee camps and cooperation with security forces.[614] UN lawyers protested US influence through finance and personnel to the ICTY.[615] The prosecutor sought similarly significant deployment of investigators and prosecutors to the ICTR.[616]

The first years of the ICTR's attempts to put cases together were chaotic. Despite the Commission of Experts report disclosing RPF crimes, the original prosecutor was not aware of any alleged RPF abuses.[617] The original prosecutor spent his two year tenure

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[610] Fondation Hirondelle, "Cost of the ICTR to reach $1 billion by the end of 2007," *allAfrica.com*, 12 May 2006.
[611] Scheffer 2012, 85.
[612] Ibid., 84.
[613] Ibid., 85.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Goldstone, 2013.

attepmting to put in place cases of genocide.[618] The efforts by the US preceding the establishment of the ICTR focussed exclusively on tracking down and detaining the genocide's leaders.[619] The prosecution was affected by genocidaire aligned obstruction as well as RPF aligned support. French, Tanzanian and Congolese governments (all supporters of the former Hutu Rwandan government) did not assist. They cited a lack of domestic legal authority to detain suspects of genocide committed in a foreign State, or the authority to arrest persons in a foreign territory, as per the French peacekeepers in Rwanda.[620]

ICTR inability to identify and commence investigations into RPF abuses may be better explained by factors beyond prosecution control than conscious prosecutorial bias or political expediency. In explaining non-pursuit of RPF crimes, a former senior prosecutor cites the information available to him at the time:
"Well at what point does that come to light? All I can tell you, I have no recollection at all of it coming to my attention or for whatever reason. Whether they came to the attention of the deputy prosecutor… I just don't know. But certainly the chief of investigations, Al Breau, as far as I recollect never raised it."[621]

The small proportion of crimes carried out by the RPF are totally overwhelmed by those of the Hutu government and its supporters. It is natural that a prosecution would begin with the primary body of offending, particularly when investigation capacity was inadequate to

[618] Ibid.
[619] Scheffer 2012, 109.
[620] Ibid.
[621] Goldstone, 2013.

pursue the genocide's leaders.[622] The difficulty of moving straight to RPF crimes was exaggerated by the chaotic administrative environment within which investigations occurred. The US sought vigorously to provide a buffer to its newly empowered Rwandan ally by working to accompany the Court's locating Resolution, with language that not only demanded genocidaire apprehension, but also prohibited Hutu attacks against Rwanda from eastern Congo.[623] In assisting incrimination and isolation of Hutu leaders, the US sought to authorise government's to arrest leading suspects before their formal indictment, and to coordinate suspect investigative and location efforts with the prosecution.[624]

Whether intended or not, US-engagement with the ICTR prosecution reduced case selection 'uncertainty', thereby avoiding the transaction cost of Rwanda-based trials that would inevitably be viewed as biased. Employing a Security Council institution allowed the US to legitimize its RPF support, while constraining French-supported Hutu capacity to re-contest RPF control of government.[625] President Museveni's shared interest in protecting his ally's control of government was evident in his express support for a tribunal.[626] While realist-oriented intentions for a judicial process were evident, some African leaders, the Organisation of African Unity (OAU) leadership, including Nelson Mandela, appeared to demand for the same international justice response for Rwanda, as for Yugoslavia, for normative reasons.[627]

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[622] Ibid.
[623] Scheffer 2012, 109.
[624] Ibid.
[625] Shattuck 2003, 59.
[626] Ibid., 52.
[627] Ibid.

France sought to undermine US action to impede Hutu military action by opposing both efforts to compel States to arrest gennocidaires and US assistance to investigations.[628] French interests in assisting its ally may also have been advanced by the threat of abandoned genocidaires testifying to France's role in aiding and abetting the genocide. The prosecutor cites non-pursuit of French support of the genocidaires as a consequence of limited investigative capacity and pressure to produce indictments quickly:

"It [prosecution of French nationals) may have been raised in media reports. Certainly during my period, the limited staff we had was concerned… I mean the chief of investigations, Al Breau, said, 'Look. I need 18 months. And at the end of 18 months, I'll give you indictments against all the leaders.' I said, 'How? If we don't have indictments out in 8 weeks, we're not going to be here.' I understand that in a national investigation you could take 18 months. I said we don't have that luxury. We need to get the indictments. That was the UN political reality."[629]

France, it was believed, had the most complete information of any western government including access to witnesses, evidence and perpetrators.[630] The French Security Council delegation preferred a non-binding statement by the Security Council President requesting that States arrest genocidaires on their territory rather than a Security Council resolution demanding it.[631] The US, which suspected France sought to assist genocidaires' escape, preferred detention of suspects before they were indicted.[632] Security Council members sided with France and the application of law. They 'urged' rather than 'demanded' that

[628] Scheffer 2012, 109-10.
[629] Goldstone, 2013.
[630] Kaufman 2008, 229-60, 247.
[631] Scheffer 2012, 110.
[632] Ibid.

States arrest and detain those on their territory for whom there is sufficient evidence of responsibility for crimes in the Court's Statute. This position accorded with French law and international law.[633] France also assisted Hutu allies by impeding many attempted genocide prosecutions on its territory. In doing so it cited the absence of the crime of genocide under Rwandan law during the genocide and the issuance of arrest warrants more than ten years after the crimes occurred.[634]

The ICTR prosecution's inability to pursue French actors was evident in the capacity consequences of the prosecution's administrative dependence on the registry.[635] In 1997 the UN Office of Internal Oversight Services (UNOIOS) found there was not a single registry administrative area that functioned effectively.[636] There was no finance accounting system, meaning reports could not detail allotments, precluding any accountability to UN headquarters.[637] The administrative chaos also facilitated ambiguous lines of authority, weak internal controls, recruitment of unqualified personnel, procurement that breached UN standards and procedure, and an inadequately supported prosecutor's office in Kigali.[638] The UNOIOS report cited identified 'administrative, leadership and operational problems' within the office of the prosecutor.[639] The report cited staff lacking appropriate experience, particularly legal personnel, and inadequate vehicles, computers and office

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[633] UN Security Council, *Security Council Resolution 978 (1995)*, 27 February 1995, S/RES/978 (1995).
[634] Associated Free Press, "French court orders release of Rwanda genocide suspect," 12 September 2013.
[635] Goldstone, 2013.
[636] UNGA, Fifty-first session agenda items 139 and 141, Financing of the ICTR for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994, *Report of the Secretary-General on the activities of the Office of Internal Oversight Services*, 6 February 1997, A/51/789, 2.
[637] Ibid.
[638] Idid.
[639] Ibid.

equipment.[640] The prosecution found it particularly difficult to get personnel to go and live in Kigali – a non-family post.[641] He could not hire French or Senegalese nationals because of France's alleged role in the genocide and Rwandan opposition to Senegal's perceived French allegiance.[642] Belgium refused to allow its nationals to work at the tribunal, and so disproportionate dependence was placed on French-speaking sources such as Canada.[643] The fact that thirty of the eighty investigative posts remained unfilled in 1997 instructs the prosecution's acquiesence to US secondment of personnel. Chain of command and leaderhsip problems within the prosecution then rendered seconded personnel greater scope to shape investigative direction.

The chaotic nature of the Court's infancy increased the strong case selection influence of US government provision of information in the Court's early years. US influence over prosecutorial appointment was made clear by Justice Goldstone's retention in-post for three months more than was planned, eventually concluding in September 1996 in what he terms the "very early days of investigation."[644] Bill Clinton had asked Mandela to have Goldstone stay longer.[645] Norm entrepreneurs were also influential. Much of the investigative focus was instructed by human rights reports by governmental, inter-governmental and non-governmental organizations.[646] The investigation did not employ a systematic approach to investigations. While investigations targeted persons with command control or most responsibility, case selection criteria did not instruct

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[640] Ibid.
[641] Goldstone, 2013.
[642] Ibid.
[643] Ibid.
[644] Ibid.
[645] Ibid.
[646] Jonathan Moses, Former Prosecutor, ICTR, 23 May 2012, Auckland, New Zealand, interview n°85.

investigative resource allocation.[647] The prosecution issued thirty-nine indictments and made twenty-five arrests in its first three years, all of which related to crimes committed by the genocidaires.[648] From 1998 to 2001, the tribunal issued a further forty indictments and arrested a further thirty-two accused.[649] Between 1995 and 2001, the court secured thirteen convictions.[650]

The chaotic nature of the Court's early years also severely hindered prosecution access to witnesses. The Court did not have a witness protection program throughout its first two years, when witnesses desperately needed protection. Hastily made hirings diminished vetting of personnel allegedly involved in killing Tutsis and leaking witness information, enhancing the threat to witnesses.[651] Of the twelve personnel investigated, two were convicted for their role in the genocide.[652] A 1994 report citing the absence of 'fully developed' witness-related programmes and negligent senior prosecution and registry personnel caused the registrar and deputy prosecutor's dismissal.[653] Rampant corruption and incompetence within the Arusha-based prosecution, had severely constrained

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[647] Ibid.
[648] Scheffer 2012, 111.
[649] Ibid.
[650] Ibid.
[651] Victor Peskin, "Rwandan ghosts: Eight years after the genocide, an international tribunal is failing to sort the criminals from the victims," *Legal Affairs*, September–October 2002; Fondation Hirondelle. "ICTR defends appointment of a lawyer wanted in Rwanda for genocide crimes," *Arusha Times*, 11–17 March 2006.
[652] Global Policy Forum, 'UN tribunal investigating 12 on its payroll,' 29 June 2006.
[653] The ICTR Chief Financial Officer held a file detailing rampant corruption and nepotism, including the Registrar using the Court plane for personal trips with his girlfriend, and gross incompetence and corruption within Deputy Prosecutor, Rakotomanana's office. See: UNGA, *Report of the Secretary-General on the activities of the Office of Internal Oversight Services*, 6 February 1997, A/51/789, Fifty-first session agenda items 139 and 141, Financing of the International Criminal Tribunal for the Prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 31 December 1994, 2; James Lyons, Former ICTR investigator, 4 October 2013, via telephone, interview n°31; Michael Hourigan, Former investigator, ICTR, 20 September 2013, via telephone, interview n°64.

prosecution capacity to impartially investigate all crimes.[654] Arusha-based deputy prosecutor, Honore Rakotomanana, a Madagascan, "had no experience as a criminal prosecutor or judge. Nor did any of his people, none of the trial attorneys."[655] Communication through an interpreter, between The Hague-based prosecutor and Rakotomanana exaggerated these problems.[656] By 1996, when the witness protection program was finally established, at least ninety-nine witnesses had been killed.[657] Killings of genocide survivors continued even after a witness protection program was established.[658] For example, from January to mid-February 1997, a Human Rights Field Operation in Rwanda "learnt of eight separate incidents in the country in which an estimated fifty-four genocide survivors and persons associated with them were killed and a further twenty-two injured."[659] Ordinarily, the greatest threat is to insider witnesses holding information demonstrating command control of senior military, political or other actors. However, protection at the ICTR appeared most important for victims and other scene of crime witnesses. In Rwanda, the leadership that organized the killing did not

[654] Lyons, 2013; Hourigan, 2013.

[655] One lead investigator left the prosecution because he feared Rakotomanana's retribution if, as the investigator suspected, he knew who had passed a file to UNOIOS implicating Rakotomanana in corruption. Lyons, 2013.

[656] Goldstone, 2013.

[657] Chris Mahony. *The Justice Sector Afterthought: Witness Protection in Africa*. Pretoria: Institute for Security Studies, 2010, 65; Paul Magnarella. *Justice in Africa: Rwanda's genocide, its courts and the UN criminal tribunal.* Burlington: Ashgate, 2000, 74.

[658] UN Economic and Social Council, Question of the violation of Human Rights and fundamental Freedoms in any part of the world with particular reference to colonial and other dependent countries and territories, Human Rights field operation in Rwanda, *Report of the United Nations High Commissioner for Human Rights*, Commission on Human Rights, Fifty-fourth session, Item 10 of the provisional agenda, 19 February 1998, E/CN.4/1998/61, 8, para 22.

[659] UN Economic and Social Council, Question of the violation of Human Rights and fundamental Freedoms in any part of the world with particular reference to colonial and other dependent countries and territories, Human Rights field operation in Rwanda, *Report of the United Nations High Commissioner for Human Rights*, Commission on Human Rights, Fifty-third session, Agenda item 10, 17 March 1997, E/CN.4/1997/52, 4, para 10.

make any secret of it.[660] Genocidaire leaders boasted about their actions in the media, diminishing dependence on insider witnesses.[661]

In September 1996, Louise Arbour took over as prosecutor from Richard Goldstone.[662] Arbour's election demonstrates the UN Secretariat's distrust of the US at the time. Goldstone had suggested Arbour's election to Secretary General Boutrous Boutrous Ghali.[663] Boutros Ghali suspected he had been put up to proposing Louise Arbour's candidacy by the US.[664] However, Boutros Ghali became enthusiastic about Arbour's appointment when State Department legal advisor, Conrad Harper, told the Washington Post he opposed Arbour's absence of prosecutorial experience.[665] Madeleine Albright met Arbour and "she wowed all of them."[666]

Arbour's tenue encountered the prosecution's first consideration of RPF crimes and the first episode of direct political interference in case selection. It demonstrated that the normative influence of international crimes prosecution at the minimum facilitated investigation of crimes against the interests of key designing actors.

Michael Andrew Hourigan, was leading investigations into Colonel Theoeste Bagosora, Colonel Anatole Nsengiyumva, the murder of thousands of elites in the first days of the

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660 Goldstone, 2013.
661 Ibid.
662 Ibid.
663 Ibid.
664 Ibid.
665 Ibid.
666 Ibid.

genocide, and the shooting down of the Presidential aircraft on 6 April 1994.[667] Hourigan reported to James Lyons, an ICTR investigation lead commander. He was asked by Lyons to set up a more independent and sophisticated investigation that was not as dependent on local leadership in Rwanda.[668] In January 1997 three RPF insiders informed Hourigan that the RPF had not been happy with how the 1993 peace agreement was being implemented, and had, around 15 March 2004, put in place a contingency plan.[669]

"Three (3) informants (either former or serving members of the R.P.F.) claiming direct involvement in the 1994 fatal rocket attack upon the President's aircraft. Their evidence specifically implicated the direct involvement of President Paul Kagame, members of his administration and military. The informants also advised that the Kagame administration was actively involved in covert operations aimed at murdering high profile expatriate Rwandans – one such murder was the death of Seth Sedashonga in Nairobi."[670]

In subsequent reports Hourigan described two of the witnesses as members of the RPF special operation team called 'the Network'.[671] His UN report asserts that two of the informants were willing to testify before the ICTR that the Network had shot down the plane "with assistance of a foreign government," if their security could be guaranteed.[672]

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[667] *The Prosecutor v Bagosora*, International Criminal Tribunal for Rwanda, ICTR-98-41-T, Affidavit of Michael Andrew Hourigan, 8 March 2007, Exhibit DNT356.
[668] Lyons, 2013.
[669] ICTR-OTP, National Team Inquiry, Secret Internal Memorandum, provided by email from Michael Hourigan (received 19 September 2013); Lyons, 2013; Former investigator, ICTR, 20 September 2013, via telephone, interview n°64.
[670] Hourigan Affidavit, 2007, 7.4.
[671] Lyons, 2013; Hourigan, 2013.
[672] UN Office of Internal Oversight Services, Investigation Section OIOS, *Confidential Information Report,* Michael Hourigan, 1 August 1997, ST/SG8/273, para iv, provided by email from Michael Hourigan (received 19 September 2013); Hourigan, 2013.

The sources stated that they were able to provide hard copy evidence of the attack plan.[673] One of the sources was a person that shot a surface to air missile that brought down the plane.[674] Neither Justice Goldstone nor Arbour had ever informed the investigators that the investigation into the plane crash was outside the mandate of the ICTR.[675] Hourigan found the testimony to be "very detailed' and "very credible."[676] Hourigan informed Commander Jim Lyons. Together they attended the US Embassy, where Hourigan used a secure telephone to communicate the situation to Louise Arbour at the US Embassy in The Hague.[677] Hourigan was not aware of the historical relationship between the US and the Kagame government.[678] Arbour was excited by the investigative breakthrough, and advised Hourigan that the corroborated information received from Alison Des Forges of HRW implicated President Kagame.[679] HRW provided theories of who might have shot down the plane.[680] However, they have never reported findings relating to received testimony despite Hourigan's in-person testimony to the HRW executive director in New York.[681]

The following week, Hourigan was told that he had been asked to go to The Hague to brief Arbour on the investigations. Prior to the meeting Hourigan met with Chief Investigator, Al Breau who listened to Hourigan's story. At the meeting, Hourigan presented Arbour the

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673 ICTR-OTP, National Team Inquiry, *Secret Internal Memorandum*, provided by email from Michael Hourigan (received 19 September 2013); Hourigan, 2013.
674 ICTR-OTP, National Team Inquiry, *Secret Internal Memorandum*, provided by email from Michael Hourigan (received 19 September 2013); Hourigan, 2013.
675 Hourigan Affidavit, 2007, para 6; Hourigan, 2013.
676 Hourigan Affidavit, 2007, para 9; Hourigan, 2013.
677 Hourigan Affidavit, 2007, para 10; Hourigan, 2013; Lyons, 2013.
678 Nick MacKenzie. "Uncovering Rwanda's secrets," *The Age*, 10 February 2007, available: http://www.theage.com.au/articles/2007/02/09/1170524298439.html (accessed 18 September 2013).
679 Hourigan Affidavit, 2007, para 10; Hourigan, 2013.
680 HRW, *Leave none to tell the story: Genocide in Rwanda*, 1999.
681 Hourigan, 2013.

evidence and stated that the investigators involved were held in the highest regard, a position supported by Chief Investigator Al Breau, despite aggressive questioning by Arbour about the sources of the information.[682] Arbour advised Hourigan that:
"the National Team investigation was at an end because in her view it was not in our mandate. She suggested that the ICTR's mandate only extended to events within the genocide, which in her view began 'after' the plane crash."[683]

Despite protestations that the temporal and territorial jurisdiction of the Court, as well as the crimes within the Statute, included terrorism and murder within Rwanda during 1994, Arbour insisted the investigation cease.[684] Arbour asked if the memo provided to her was the only copy.[685] Al Breau did not comment in support or against Hourigan's contestations of Prosecutor Arbour's decision to end the investigation. Hourigan never discovered what happened to the three informants.[686] The functional control of designing actors over the ICTR case selection independence appeared to have triggered its first direct and explicit intervention of restraint.

Arbour's decision to cease the investigation had no basis in law, or investigative practice. The likelihood that witnesses will be unwilling or unable to testify in support of witness statements is justification for not proceeding with a case. The witnesses corroborated one another's testimony, held direct knowledge of the crime and were prepared to testify, despite having to relocate. That level of evidence is certainly adequate to provide for

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[682] Hourigan Affidavit, 2007, para 20-21; Hourigan, 2013.
[683], Hourigan Affidavit, 2007, para 22.
[684] Ibid., para 22-29.
[685] Ibid., para 28.
[686] Nick MacKenzie. "Uncovering Rwanda's secrets," *The Age*, 10 February 2007.

further investigation and is likely, *prima facie*, to be adequate to support an indictment. RPF capacity to compromise the credibility and availability of witnesses hostile to its interests was exaggerated by the fact that investigations took place primarily within Rwanda, in cooperation with the Rwandan State. Knowing that prosecution criteria in selecting cases includes a "reasonable prospect of conviction based on the availability of witnesses, their competence and credibility", concentrates Rwandan State efforts to impede investigations on witnesses' availability and credibility.[687]

The prosecution suspected that witnesses to RPF crimes might have been unwilling to testify out of fear for their own or their family members' safety.[688] The RPF threat has also caused reluctance to cooperate on the part of defence witnesses.[689] Many sources came forward to investigators to alert them to crimes but were not willing to testify before the ICTR.[690] Witness fears appeared well founded. The Rwandan government was able to closely monitor the ICTR investigation.[691] The Court's witness protection programme was poorly capacitated and dependent on cooperation from the Rwandan government. Witness support is not provided for in the Court's assessed budget. Finance for witness support instead comes from a voluntary fund.[692] As States are already contributiong to the ICTR through their obligations to the UN, they are reluctant to contribute to the voluntary fund

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[687] Alex Obote-Odora, "Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda" in Morten Bergsmo (ed.). *Criteria for Prioritizing and Selecting International Crimes Cases.* FICHL Publication Series No. 4. 2009, 45-7, 52.
[688] Moses, 2012.
[689] ICTR, *The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Nyiramasuhuko's strictly confidential *ex-parte* — under seal — motion for additional protective measures for defence witness WBNM, Trial Chamber II, ICTR-97-21-T, 17 June 2005; Goran Sluiter, "The ICTR and the protection of witnesses," *Journal of International Criminal Justice*, 3(4) (2005), 962–976.
[690] Moses, 2012.
[691] Lyons, 2013.
[692] Anne-Marie de Brouwer, "Reparations to victims of sexual violence: Possibilities and the International Criminal Court and at the trust fund for victims and their families," *Leiden Journal of International Law* 20(1) (2007), 207–237, 216.

for witness protection.[693] A lack of funding caused critical elements of witness protection to be neglected. In 1997, $5000 was allocated for provision of rural witnesses with clothes and shoes to attend trial.[694] The sparce funding of the Court's witness protection program alongside reluctance of other States to receive witnesses, rendered protection more dependent upon cooperation with the Rwandan government, which insisted that witnesses were relocated within Rwanda in cooperation with Rwandan law enforcement and intelligence officers.[695] The security of relocated witnesses after testimony is monitored by the Rwandan State security apparatus. The Rwandan government role, along with the absence of alternative external relocation, disincentivized the participation of witnesses of RPF crimes.[696]

The Rwandan government also employed cooperative methods to monitor and control investigations. Government officers accompanied prosecution investigators to provide 'security and transport'.[697] The government officers interviewed some of the ICTR witnesses after investigators had left.[698]

Because early investigations focused solely on the genocidaires, the prosecution's only disagreement with government was over primacy for Colonel Bagosora's trial.[699] Rwanda's signaling, through investigative control appeared to affect Arbour's willingness

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[693] Steven Roper and Lilian Barria. *Funding institutions of human rights: Do international tribunals provide good value?* Annual Meeting of the American Political Science Association, Washington D.C.,1–4 September 2005, 2.
[694] Ibid., 18.
[695] Mahony 2010, 73-4.
[696] Ibid.
[697] Goldstone, 2013.
[698] Ibid.
[699] Ibid.

to pursue RPF cases. In considering whether to investigate RPF crimes, Arbour considered a number of variables. Firstly, she believed her office could not investigate RPF crimes without Rwandan government detection. Arbour believed Rwanda had sources in her office and was monitoring prosecution mail.[700] Secondly, discrete access to witnesses was impossible because of the Rwandan government's role in investigations and protection. Arbour also had to consider the security threat to investigators working within Rwanda.[701] The Rwandan government's continued obstruction of commissions of enquiry into former President Habyarimana's assassination indicated its hostility towards RPF investigations.[702] Conducting investigations outside a State in which crimes occurred makes the acquisition of sufficient evidence to prosecute a lot more difficult. Nonetheless, adequate evidence to pursue RPF crimes had been presented to the prosecutor. Despite its failure to exclude RPF crimes from the ICTR's jurisdiction, the RPF government had to this point successfully employed implicitly intimidating presence to deter investigation of crimes it committed.

3.7 The Prosecutor versus the President

The ICTR/Y's third prosecutor would not be as vulnerable to intimidation as Louise Arbour. In 1999, the Secretary General needed a candidate that was not from Russia, China, a NATO State, the EU, or a former non-aligned State, in order to appease both Eastern and Western P5 states.[703] After NATO's aerial bombardment of Serbia, Russia and

[700] Peskin 2008, 190.
[701] Ibid.
[702] Tribunal de Grande Instance de Paris, First Vice-President, Chambers de Jean-Louis Bruguiere. *Issuance of International Arrest Warrants*. Order to Execute. Doc PI06-0046 (E), 9 January 2007, 2-4.
[703] Del Ponte 2009, 29.

China were not prepared to accept a new chief prosecutor from a NATO country.[704] These circumstances significantly diminished RPF allies' control over the prosecutor's appointment. Switzerland nominated its Attorney General, Carla Del Ponte for the position and she accepted in August 1999.[705] Del Ponte informed the media that she had the assurance of the UN Secretary General that she could conduct her work with 'complete independence'.[706]

Despite the chaotic beginning to the ICTR's function, against the backdrop of a devastated and incapacitated Rwandan State, Kagame proved adept at procuring patronage from the British and American governments. Much of that patronage was directed towards justice sector reform and a more sophisticated security state.

Apart from the Commission of Experts and other reports of the Office of the High Commissioner for Human Rights, Del Ponte took advice from HRW, who identified not only crimes committed by the genocidaires, but found that RPF:

"crimes were so systematic, so widespread, so numerous, and so dispersed in time that the militia's commanders had to have known about them, even if the militia's commanders did not specifically order them; even if the militia's commanders did not specifically order these acts, the commanders had failed to take effective action to halt them or to discipline the soldiers and officers responsible."[707]

[704] Ibid.
[705] Ibid., 30-1.
[706] Ibid., 31.
[707] Del Ponte 2009, 178, citing: HRW, *Leave none to tell the story: Genocide in Rwanda*, 1999.

A former ICTR senior prosecutor, cites the ‘absence of evidence’ explanation, “you can have a whole lot of statements saying ‘oh, the RPF committed all these atrocities.’ But in terms of actually nailing it on individuals, you know, you have to have evidence.”[708]

Eastern pressure on the prosecutor’s election produced a candidate as independent as the Court’s first, but without the functional impediments of building an office. Del Ponte would demonstrate her status as a norm entrepreneur by seeking to expand the prosecution’s case selection independence. Upon taking over as prosecutor, Del Ponte considered the approach towards RPF crimes. Director of investigations Laurent Walpen advised that any investigation needed to occur in secret if at all possible. As Del Ponte’s predecessors discovered, the Rwandan security forces would interview witnesses, interviewed by the prosecution, and had prosecution personnel under surveillance in Rwanda.[709] The US had provided Kagame’s government with surveillance equipment that they used to monitor the prosecution’s fax, telephone and internet communications, as well as their computer system.[710] The Rwandan government had also placed informants among the prosecution’s translators and other staff members.[711] Further, the US had impeded the prosecution’s acquisition of encrypting cell phones allowing the Rwandan government to monitor prosecution communication in real time.[712] By supporting the Rwandan government and providing evidence that incriminated the genocidaires, the US was able to indicate its case selection preference. Simultaneously, the US impeded prosecution capacity to make a case against the RPF, in case US signals were ignored. The ICTR’s

[708] Moses, 2012.
[709] Del Ponte 2009, 183.
[710] Ibid.
[711] Ibid.
[712] Ibid.

critical designing actor was seeking to diminish the threat to its interests of potential RPF indictments by applying functional constraints to Del Ponte's office. While the Court's design facilitated the agency of a prosecutor independently investigating both parties to the conflict, the functional impediments were driving a normative contraction. However, realist state interests sought subtle imposition of functional constraints in order to retain perceived institutional integrity, and thus the full power of selective application of the norm to adversaries.

For the norm entrepreneur, Del Ponte, conducting investigations in secret appeared impossible. Some elements within the prosecution believed that the prosecutor needed to engage the RPF cases once the trials of genocidaires were complete, extinguishing the Kagame government's disruption of those trials as a method of cooperative intimidation.[713] On 9 December 2000, Del Ponte informed President Kagame that the prosecution had begun investigations into RPF crimes.[714] Kagame informed Del Ponte that Rwandan prosecutors were investigating the charges, investigations that had been ongoing for seven years.[715] Kagame agreed to cooperate but requested that Del Ponte not pursue all thirteen cases, as it would place too much pressure on Kagame from his armed forces.[716] Kagame directed Del Ponte to the chief military prosecutor to obtain the military's investigation files. The military prosecutor stated that the investigations would be conducted domestically and would not be the work of the tribunal.[717] Del Ponte sought to increase the 'compliance-pull' of the norm of international crimes prosecution. Conscious of the need

[713] Moses, 2012.
[714] Del Ponte 2009, 184.
[715] Ibid.
[716] Ibid.
[717] Ibid., 184-5.

to apply pressure to military elements that might persuade Kagame not to cooperate, Del Ponte held a press conference in which she announced the investigations as well as Kagame's agreement to cooperate. The investigations would focus on a few incidents within the early April and mid-September 1994 timeframe in which the reported RPF massacres occurred.[718] In an attempt to dilute the signaled sovereignty costs of the investigation, she did not re-open investigations into the Habyarimana plane crash.

Despite the positive sentiment at the press conference, the military prosecutor did not hand over the requested files.[719] Instead, the Rwandan government began impeding many witnesses from testifying.[720] It also encouraged victims groups to refuse to cooperate with the Court as witnesses.[721] The government constantly changed its policy for prosecution access to witnesses. It would require new officers to authorize access that were difficult to locate. When the officers were located, they would inform ICTR personnel that policy as to who was to authorize witness access had changed and a new officer would have to be located.[722] The Rwandan government's policy was not to officially block witness participation. Instead, sophisticated obstacles to prosecution witness access were established alongside efforts to disrupt perceived French influence. The Rwandan government viewed Senegalese ICTR employees, particularly the Registrar, as agents of French interests, given Senegal's historical diplomatic allegiance to France. The government presented a list to the Security Council of Senegalese nationals it suspected.[723]

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[718] Ibid., 184-7.
[719] Ibid., 186.
[720] Moses, 2012.
[721] Peskin 2008, 199-204.
[722] Moses, 2012.
[723] Ibid.

The Registrar responded with a letter stating that Rwandan government personnel were no longer able to use the UN plane, as it is reserved for UN personnel only.[724] The Rwandan government replied with a letter communicating their understanding and ensuring that the policy would be implemented. They also asked how the ICTR would like the witnesses to get to Arusha, since they are not UN personnel. The Registrar backed down on government personnel use of the plane within twenty-four hours.[725] Witnesses arriving at Kigali airport were still refused permission to leave because they lacked a "document no one had ever heard of."[726]

Del Ponte met with Kagame to discuss the bureaucratic impediments the prosecution was facing in April 2001. Kagame assured the prosecutor that the issues she was facing would be addressed and instructed the Lieutenant Colonel to "please cooperate with Prosecutor Del Ponte."[727] Kagame's rhetoric along with large prosecution allocation of resources to the RPF investigation stimulated hopes of a breakthrough.[728] Rumors circulated within the prosecution that Kagame, when Del Ponte was pushing him the hardest, was going to offer up an RPF accused he perceived as a domestic political threat.[729] However, a week after a Kagame assurance, Del Ponte was informed that the Lieutenant Colonel categorically refused to cooperate and insisted that the prosecutor had misinterpreted her meeting with President Kagame.[730] The Rwandan government had abandoned its policy of disruption and implicit opposition in favor of more explicit opposition. In late 2001 the Rwandan

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[724] Ibid.
[725] Ibid.
[726] Del Ponte 2009, 186; Peskin 2008, 213
[727] Del Ponte 2009, 187.
[728] Moses, 2012.
[729] Ibid.
[730] Del Ponte 2009, 187.

Prosecutor General, in a meeting with Del Ponte, made it clear he knew where her investigators had gone, the testimony they had collected and the overall result of the investigation.[731] As a consequence of the related witness and investigator safety concerns, Del Ponte decided that it was unsafe to continue investigations inside Rwanda.[732] In 2002, the Rwandan government moved from impediment to complete obstruction of witness participation, bringing ICTR cases to a standstill and placing some in jeopardy.[733] In June 2002, the Prosecutor visited Kagame in Kigali where he instructed her that the tribunal must not investigate the Tutsi militia he had commanded.[734] Kagame stated:
"You misunderstood what I told you before. Now I'm telling you what you are doing. Don't touch…Stop the investigation… We know what you are doing… We will not allow you to do this."[735]

Kagame demanded that the prosecutor investigate France's role in the genocide. The Prosecutor stated that she would and requested evidence upon which to proceed with investigations.[736] That information was not forthcoming. RPF inability to collect intelligence demonstrating French support of the genocidaires during RPF attempts to seize Kigali could explain the absence of that information's provision. Both Kagame and Del Ponte were aware that a French Judge had launched an investigation into the RPF's role in shooting down Habyarimana's plane.[737] Similarly, Kagame may have been unwilling to

[731] Ibid., 191.
[732] Ibid.
[733] Ibid., 224.
[734] Ibid., 225.
[735] Ibid.
[736] Ibid., 226.
[737] It should be stated that there are multiple theories and varied evidential bases for assertions of responsibility as to the shooting down of the plane carrying the Rwandan and Burundian Presidents. For

provide evidence incriminating the French in order to persuade the French government not to continue the investigation of Habyarimana's death. The exclusion from Rwanda of the former Hutu government diminished their capacity to provide information incriminating the RPF. The disparity in the capacity to affect case selection indicates the exaggerated influence of controlling government. The Rwandan government also employed the victim narrative to accompany the realist assertion of non-cooperation as dual instruments of pressure on the ICTR prosecution. In June 2002 Tutsi victims groups were rallied to protest outside the ICTR office in Kigali, shouting slogans about tribunal employment of genocidaire suspects and failure to protect Tutsi witnesses.[738] Victor Peskin suggests that disclosure of an RPF investigation after handing down indictments would have allowed the tribunal to continue to function.[739] However, that approach would likely have failed because Rwandan surveillance would have alerted the government to the prosecution's intent.[740]

Peskin also criticizes Del Ponte's unwillingness to apply pressure to the Rwandan government, particularly to prosecute it for non-cooperation and to bring political and legal justifications for compelling cooperation to the international community's attention.[741] Peskin's critique presumes such pressure would have had an impact on the policy positions of Kagame's allies. However, Del Ponte held little confidence that the UN Security Council would support efforts to compel Rwandan cooperation.[742] Her view was formed

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example, See: Section on the 'The attack on Habyarimana's plane' in Human Rights Watch, *Leave none to tell the story: Genocide in Rwanda*, 1999; Del Ponte 2009, 226.

[738] Peskin 2008, 216.

[739] Ibid., 209.

[740] Hourigan, 2013.

[741] Peskin 2008, 208.

[742] Del Ponte 2009, 226.

on the basis of her experience at the ICTY, where her independence had ostracized her from the US. On May 14 1999, Louise Arbour had established a working group to assess NATO's aerial bombardment of Serbia. Del Ponte supported the working group[743] and publicly announced she was investigating a dossier of allegations against the NATO bombing campaign.[744] Del Ponte was made *persona non grata* in Washington where high-ranking officials refused to meet with her as part of an "isolate and annoy" strategy.[745] It was at this time that a sleeping giant – the US, was awakened to the limits of functional control using implicit means under the ad-hoc tribunal model. Del Ponte was finding it increasingly impossible to conduct an effective investigation of RPF crimes. The UK and US held an interest in protecting the Kagame regime which would advance Anglo-American interests in the mineral rich Eastern Congo.[746] That interest was confronted by the vociferous support Del Ponte received from HRW who wrote to the US Ambassador to the UN noting that Rwandan claims to be pursuing RPF cases themselves were spurious – the trials were few, and the sentences were light.[747]

Del Ponte's continued pursuit of RPF crimes was to provide a critical test of the extent to which the norm of international crimes prosecution was cascading. The normative power was particularly tested in that the leading civil society actor vociferously supported independent prosecution case selection, even though it appeared reluctant to pursue evidence provided by ICTR investigators on the Habyarimana assassination.

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[743] Ibid., 59.
[744] Scheffer 2012, 290.
[745] Victor Peskin, citing western diplomats, cites Del Ponte's failure to secure western support as a communication issue. However, David Scheffer, a former US Ambassador at Large for War Crimes, notes that Del Ponte's lack of communication or cooperation was due to her investigation of NATO bombardment of Serbia. See: Peskin 2008, 211; Scheffer 2012, 291-2.
[746] Peskin 2008, 211.
[747] Del Ponte 2009, 228.

The normative pressure had little effect on US policy. By blocking access to material and witnesses within Rwanda, the Rwandan government, without serious US protest, impeded evidence sufficient to submit an indictment. The investigations were suspended, but not closed and witnesses began traveling freely to Arusha.

However, the Rwandan and American governments sought case closure, not merely suspension. Together they set about making more explicit their intent to constrain case selection independence. In March 2003 the US signed a bilateral Article 98 Agreement with Rwanda preventing Rwandan surrender of US nationals to the ICC. In May 2003 Del Ponte was summoned to a meeting at the State Department with then US War Crimes Ambassador, and former ICTR lead prosecutor,[748] Pierre Prosper. Also attending was a Rwandan delegation, including the Rwandan Ambassador to the US. Prosper endorsed the Rwandan Ambassador's demand that Rwanda, not the ICTR, should investigate and prosecute RPF crimes.[749] At one point, Prosper presented a draft agreement that he asked Del Ponte to sign. It handed jurisdiction for prosecuting RPF crimes to the Rwandan government. Del Ponte refused. Prosper informed her that:

"… some States think that the [international tribunal for Rwanda] should have its own prosecutor. You will not be reappointed. And for the [Yugoslavia tribunal] you will be reappointed only for two years."[750]

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[748] See Profile page of Pierre Prosper, Arent Fox LLP.
[749] Del Ponte 2009, 231.
[750] Ibid., 233.

Prosper mentioned that Great Britain was among those States in favor of such a move. Del Ponte's first four-year term was due to expire in September 2003. Del Ponte viewed the case selection approach she had taken as "Disturbing a political status quo that people in the diplomatic community wanted to develop further."[751] Days later, Del Ponte received a fax from Prosper providing the agreement granting jurisdiction over RPF crimes to the Rwandan government.[752] When Del Ponte refused, with the support of the Secretary General's office, the US began lobbying Security Council members against her full reappointment, in favor of a one or two-year term at the ICTR only. Del Ponte interpreted such a short tenure as granting "less independence than a dog with a choker chain clipped to a short leash."[753] In support of the US, the Rwandan government argued that prosecution of a genocide that claimed one million people could not be a part-time job.[754] However, the appointment required the consent of other Security Council members, a process that had secured Del Ponte, as a non-EU, non-NATO national, the position of prosecutor.[755] The Security Council, weary of the cost of opening another investigative front appeared acquiescent to the US position without interrogation.[756] President of the ICTY and former US State Department Counselor, Justice Theodor Meron supported US removal of Del Ponte.[757] Elements within the Secretary General's office also accepted the decision was a political one, and that it would be the end of the investigation into RPF crimes.[758] The

[751] Ibid.
[752] Ibid., 234.
[753] Del Ponte 2009, 234.
[754] Peskin 2008, 218.
[755] Del Ponte, 2009, 231-239.
[756] Ibid., 239.
[757] US Department of State, Diplomatic Cable, *ICTY: President Meron urges USG to oppose Del Ponte renewal*, 17 July 2003, 03THEHAGUE1827_a.
[758] Del Ponte2009, 237-8.

Secretariat pointed out that two, perhaps three P5 members supported the decision, that the Security Council is a political institution, and that it makes political decisions.[759]

The US and the UK, through the Security Council, provided a completion directive presenting fiscal responsibility as justification for cessation of politically sensitive investigations into their client, the RPF government. Human rights groups continued to advocate that the RPF cases be followed through.[760] The completion directive, by requiring that investigations conclude within a year, and that activities conclude by 2010, exaggerated the cooperative leverage of the Rwandan government.[761] Were investigations of RPF crimes to continue, the Rwandan government could have impeded investigations, causing the completion deadlines to be missed. The directive also required the court to refer cases of intermediate to lower-ranked accused to national jurisdictions, including those of Rwanda.[762]

The completion directive still facilitates pursuit of crimes committed by both parties to the conflict. However, the new prosecutor, Hassan Abubacar Jallow, took an elastic interpretation of ‘intermediate to lower ranked accused’, and inferred cases of intermediate to lower ranked thematic gravity. Jallow employed criteria focused on those most ‘serious violations’ to exclude crimes other than genocide.[763] In doing so he abdicated his responsibility under the Statute to prosecute crimes against humanity and violations of

[759] Ibid.
[760] Peskin 2008, 221.
[761] UN Security Council, *Security Council Resolution 1503 (2003),* 28 August 2003, S/RES/1503.
[762] Ibid.
[763] Hassan Jallow, “Prosecutorial Discretion and International Criminal Justice,” *J Int Criminal Justice* 3(1) (2005), 145-161, 151; Obote-Odora 2009, 47.

Article 3 common to the Geneva Conventions and of Additional Protocol II.[764] A reasonable interpretation of 'intermediate to lower ranked accused' would not distinguish between crimes, but rather the number of persons that would be pursued for crimes – a number determined by seniority. Therefore, only those cases not involving the most senior persons would be referred to national jurisdictions for prosecution. However, the Security Council accepted Jallow's approach to diminishing the prosecution caseload and concluding investigations by 2004.[765] The Security Council did not require the prosecutor to take forward RPA/F cases but offered a token fig-leaf to case selection independence by requesting full cooperation from the Rwandan, and other governments.[766]

The Security Council's endorsement of prosecution referral of RPF cases to Rwanda signaled the start of the justice contraction – the diminishing case selection independence of prosecutors at international criminal courts and tribunals. Rwandan obstruction of RPF investigations, the removal of the prosecutor from her ICTR post and the required revision of case selection criteria sent a clear signal to the subsequent ICTR prosecutor not to continue investigation of RPF crimes. It also signaled prosecutors at other international courts not to venture outside case selection parameters within which UK and US interests lie.

Jallow never explained why he employed thematic prioritization, as opposed to prioritization on the basis of seniority, as proposed by the Security Council.[767] The only

[764] ICTR Statute, Articles 3-4.
[765] UN Security Council, *Security Council Resolution 1534 (2004)*, 26 March 2004, S/RES/1534.
[766] Ibid.
[767] Jallow 2005, 145-161, 152-3.

tangential explanation is the identification of genocide as 'the crime of all crimes', and therefore of elevated 'seriousness' comparative to other crimes in the tribunal's Statute.[768] A proportionality approach to case selection adopting 25,000 murders (the lowest estimate alleged RPF killings between April and September 1994) would require three RPF indictments, using the 100 person maximum case number stated by Jallow[769] and the estimated 800,000 alleged murders at the hands of the Hutu government.[770]

3.8 Conclusion

Del Ponte claims she refrained from indicting Kagame because she believed he would have jeopardized genocide trials.[771] Academics and former prosecution investigators believe RPF mass-killing cases required access to witnesses within Rwanda and to Rwandan military files in order to corroborate evidence gathered externally.[772] A former investigator believes that in order to pursue the case of Habyarimana's assassination, the prosecution required access to the Rwanda-based witnesses identified by Hourigan.[773] Louise Arbour's failure to extract the assassination case witnesses when they first presented themselves may have extinguished the possibility of their participation in any such case in the future. A French investigation presented evidence to support indictments of RPF members accused of the attack. The investigation referred the prosecution of Kagame to the ICTR because he

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[768] Obote-Odora 2009, 47.
[769] Hassan Jallow. *The completion strategy of the ICTR: A status report*. OTPs and NPAs Forum, Arusha, 26-28 November 2008, 3
[770] Number of indictments proportionate to scale of offending = ((25,000 divided by (800,000 + 25,000)) multiplied by 100 = 3.
[771] Del Ponte 2009, 235.
[772] Peskin 2008, 209; Hourigan, 2013.
[773] Hourigan, 2013.

enjoyed diplomatic immunity under French law.[774] Victor Peskin cites several sources as suggesting that the prosecution had sufficient evidence to support an indictment that went "all the way to the top" of the RPF.[775] It is unclear which incidences these were as well as whether the shooting down of the plane was one of the crimes Del Ponte was considering. The fact that the shooting down of the plane triggered the genocide indicates that it would certainly have met the ICC's gravity threshold because of its impact.[776]

The fact that Del Ponte felt a Kagame indictment would irreparably cripple the tribunal's capacity to conclude cases indicates the degree of Rwandan cooperative leverage. That leverage is a diluted version of what would have occurred were the court to have been located, as Kagame's government requested, within Rwanda. Nonetheless, the absence of provision of documentation from the Rwandan government, further exaggerated the weight that would be lent to witness testimony by the ICTR judiciary.[777]

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[774] The investigation led Kagame to again invoke victim status, cite France's role in the genocide, and support a 25,000 strong protest in Kigali. Peskin 2008, 229-30; Tribunal de Grand Instance de Paris, Chambers de Jean-Louis Bruguiere, First Vice-President, Issuance of International Arrest Warrants, Order to Execute, Parquet 97.295.2303-0, Cabinet 1341, 46.

[775] Peskin 2008, 220.

[776] *Prosecutor v. Abu Garda,* Decision on the Confirmation of Charges, ICC-02/0-02/09-243-Red, 8 February 2010, para 31. The prosecutor has cited the role of 'impact' in forming his gravity interpretation in the decision to indict Justice and Equality Movement members for attacks on peacekeepers in Darfur. The 'impact' of crimes is a prosecution criterion for considering gravity. See, Paul Seils, "The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court" in Morten Bergsmo,(ed.) *Criteria for Prioritizing and Selecting International Crimes Cases.* FICHL Publication Series No. 4, 2009, 57, citing Report on Prosecutorial Strategy, The Hague, 14 September 2006, 5.

[777] At the ICTY and ICTR, "the more access the Prosecution had to official documents of the entities involved or to audio or video evidence, the lesser weight was placed on the evidence given by witnesses." See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07, 25 April 2008 33-4, para 76, citing "ICTY, *The Prosecutor v Oelalic* [Case No 1T-96-211. Decision on the Motion of the Prosecution for the Admissibility of Evidence (19 Januarj 1998): ICTY, *The Prosecutor v Dragomir Milosevic* [Case No IT-98-29/1], Decision on Prosecution Motion to Admit Under Seal a Digital Video Disc Containing Video Interviews (24 September 2007), See Also: 1C IT. *The Prosecutor v Dragomir Milosevic* [Case No 1T-98-29/1),Judgment of the Trial Chamber (12 December2007), paras. 162. 168, 235, 336, 339, 340, 448. 596. 698, 744, etc; See also: UNGA Fifth Annual Report on International Tribunal for the Prosecution of Persons Responsible for

The Kagame regime, in opposing the ICTR's establishing resolution, demonstrated its fear and uncertainty about case selection-associated sovereignty costs that affect the RPF hold on power. Norm entrepreneurs within governments and civil society pressured the Security Council to provide an independent tribunal addressing crimes during Rwanda's civil conflict. That pressure was influential in providing court jurisdiction that rejected Rwandan efforts to exclude RPF crimes from the Court's jurisdiction and to locate the court within Rwanda. The ICTR's jurisdiction also included the French role in aiding and abetting the Genocidaires. It appears that the prosecution never obtained sufficient evidence to pursue that line of investigation. The ICTR's design excluded crimes in a regional conflict outside 1994, and outside Rwanda by non-Rwandans. However, it refrained from providing caveats to the prosecution jurisdiction that excluded particular groups, allowing a norm entrepreneur, Del Ponte, to test the norm of international crimes prosecution.

Pressures upon its function, not its design, compromised case selection independence at the ICTR. While the prosecution sought out the leaders of the genocide, it encountered difficulty in obtaining some actors, particularly those in France. The tacit complicity of the US and British governments in Rwandan obstruction of ICTR investigations into RPF crimes indicates the determinative nature of powerful state support for case selection independence. The explicit US support of Rwanda's non-cooperation established a precedent for future prosecutors at other tribunals.

Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991, 10 August 1998, para 14.

The immediate post-Cold War environment in which the ICTR was designed allowed for norm entrepreneurs to establish, within the bounds of regulatory capture, a personnel selection process that produced a prosecutor, Carla Del Ponte willing to breach the 'political status quo'. However, that same process also produced the court's second prosecutor, who, in discontinuing the Habyarimana assassination investigation, demonstrated a willingness to compromise case selection independence. The court's first prosecutor demonstrated an evidentially impartial approach during his short tenure in the tribunal's chaotic infancy.

Human rights groups, governmental actors and the prosecution communicated the Court's deficiencies and biases to global powers that could compel cooperation bilaterally or through the Security Council. However, that pressure did not appear to prompt any serious consideration of compelling Rwandan cooperation. Instead, Rwanda and the US 'assisted' the prosecution in its investigations in such a way as to skew case selection towards their Hutu adversaries without publicly presenting any clear case selection preference. As the prosecution began to fully explore all the crimes within its mandate, the Rwandan government began to signal, through declining cooperation, its discomfort. As investigations of RPF crimes became more serious, the Rwandan government increased obstruction to the point of explicit objection. Only when those objections were ignored did Rwanda seek the assistance of the US, which had to that point assumed a publicly impartial position. To that point, the US had passively shaped the Court's agenda through the Security Council and its own collaborations in related peacekeeping, humanitarian assistance and diplomacy.[778]

While the court, under Chapter VII, was presented as a ‘hard law’ institution, states’ sophistication in court design and cooperation demonstrates its soft law status. The soft law statue granted the prosecutor legal discretion to pursue the victor in Rwanda’s civil conflict.[779] However, Rwanda, the US and the UK facilitated selective application of the norm of international crimes prosecution whilst facilitating a veil of independence.

[778] Malone 2004, 2.
[779] Abbott and Snidal 2000, 430-2

Chapter 4

Judd's War: The Special Court for Sierra Leone

4.1 Introduction

Like the examination of the ICTR, this chapter first introduces the context in which the SCSL was created. I firstly provide a brief historical overview of Sierra Leone before considering the drivers of armed conflict including economic, political and social interests at national, regional and global levels. I then examine Sierra Leone's war with a view to explaining how the nature of the conflict's conclusion set an agenda that instructed the position of the SCSL's designing actors – the US government, the UK and Sierra Leonean governments, and peripherally, the UN Security Council. The US government, I argue, crafted a court with sufficiently compromised case selection independence to assist regime change in Liberia, and regime support in Sierra Leone. The US government co-opted norm entrepreneurs, to promote an alternative to the ICC without engagement of the affected community, facilitating a regression in case selection independence from the ICTR, and arguably the ICC. The chapter then examines the negotiation phase of design, the jurisdictional elements of design and the implementation of court case selection, considering both jurisdictional and functional elements of case selection independence. I conclude by providing an analysis of the level of case selection independence at the SCSL and a comparative analysis considering the preceding case of the ICTR. I then consider the applicability of various explanations of SCSL case selection independence.

4.1.1 Historical Context

Sierra Leone epitomises what Mahmood Mamdani calls 'decentralized despotism' - a structure of chieftaincy power that owed authority to its European masters - a structure of power, Mamdani observes, that was never dismantled.[780] A former British colony – the borders of modern day Sierra Leone were negotiated by Britain with France and the US who controlled territories to the respective north (Guinea) and south (Liberia). In 1961 Sierra Leone gained independence and after a coup and counter-coup following the defeat of the Sierra Leone People's Party (SLPP) in elections, the election victors, Siaka Steven's All People's Congress (APC) party was handed power. Stevens bought loyalty through ethno-regionally aligned patrimonial channels by manipulating state bureaucracy and resources to his benefit, and to the disadvantage of political opponents.[781] Using both coercion and bribery, Stevens established and maintained what Frederick Cooper calls a 'Gatekeeper State' under *de facto* and then *de jure* one party rule.[782]

The (SL-TRC) found that the foundation for state collapse and civil war was one of 'exclusion' of multiple social groups, caused by decades of misrule under an autocratic and patrimonial one party system, which emerged from a political climate of nepotism and cronyism embedded in politics by the British colonial state.[783] When mapping the

[780] Mahmood Mamdani , *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism.* London: Fountain, David Philip & James Currey, 1996.
[781] William Reno, "Privatizing War in Sierra Leone," *Current History* 96(610) (May 1997), 227-230.
[782] F. Cooper F, *Africa Since 1940, The Past of the Present,* Cambridge: Cambridge University Press, 2002.
[783] SL-TRC Report Vol 2, 2004, 12-14. The author co-authored the Truth an Reconciliation Commission Report chapter, 'The historical antecedents to the conflict'; See also: David Keen, *Conflict and collusion in Sierra Leone*, Oxford: James Curry, 2005; Ibrahim Abdullah, *Beyond greed: Memo on the Sierra Leone Conflict*, Paper prepared for conference on The Economic Analysis of Conflict: Problems and Prospects, Washington, D.C., 19–20 April 2004.

international landscape 'world capitalism' saw post world war powers being forced into conflict by competing economic interests.[784]

By the 1980's, economic agendas had become clearly the most prominent motivation for external engagement in West Africa. Predominantly American, British, and French interests were aligned in attempting to solicit external commercial penetration but competed for the fruits penetration bore. Competitors supported local actors perceived as pursuing a state's commercial and security interests to one another's detriment. These methods were commonly employed through covert channels or powerful regional actors such as Nigeria or Libya. Trends toward economic foreign policy drivers were accelerated by the 1970's liberalization of international financial markets. The corresponding increase in accessibility of external commercial enterprises allowed capital to be rapidly deployed to opportunities around the world, particularly where States in which such enterprises resided were able to assist. Powerful States were best positioned to take advantage of this shift and as a consequence, growing domestic economic interests ensured powerful States refrained from action that jeopardized their capital.[785]

After an economic boom during the 1970's, Sierra Leone's dependence on commodity exports was exposed as commodity prices fell, the state failed to formalize its black market diamond trade, and economic liberalization along with devaluations and then floatation of the Leone were imposed by donors. These economic conditions caused hyperinflation and

[784] Ngaire Woods, *Explaining International Relations since 1945,* Oxford: Oxford University Press, 1996, 13.
[785] Ibid.,14.

banking reluctance to accept Leones. Real estate speculation benefitted elites, capital flight accelerated and the middle class rapidly shrank as real salaries plummeted.[786]

By the start of Sierra Leone's conflict in 1991, social spending was just fifteen per cent of what it was a decade earlier, inflation had reached three digits, a typical monthly salary was commensurate to the value of a bag of rice, and life expectancy was less than forty years.[787] Only 150 of Sierra Leone's 250-300 doctors served outside the Freetown peninsula.[788] The economic situation meant a dangerously high number of young people were unable to assert economic independence and therefore unable to shake off the status of 'youth' with all its negative connotations of dependency.[789] This demographic was desperately seeking a means to assert power and wealth. Many Sierra Leoneans laid the sole responsibility for Sierra Leone's precarious financial predicament at the feet of their government. Analysts such as Paul Collier arrived at similar conclusions, thus exaggerating the role of kleptocratic governance at the expense of historical and global economic contextualization.[790]

[786] National Long Term Perspective Studies. *Principles, Methodology and Application in Sierra Leone*, 2008; Quirk et al, *Floating Exchange rates in Developing Countries: Experience with Auction and Interbank Markets,* Washington D.C.: International Monetary Fund, May 1987; John Weeks**,** *Development Strategy and the Economy of Sierra Leone.* New York: St. Martin's Press, 1992, 133; David Keen. *Conflict and Collusion in Sierra Leone*. Oxford: James Curry, 2005, 26.
[787] Keen 2005, 27; SL-TRC, *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol 3A, 2004 Accra: GPL Press, 79.
[788] SL-TRC Report, Vol 3A, 2004, 80.
[789] Keen 2005, 35.
[790] Paul Collier, "Doing well out of war: An economic perspective," in M. Berdal and D. Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars*, Boulder, CO.: Lynne Rienner, 2000, 96.

4.2 The Conflict

In March 1991 an armed insurgency called the Revolutionary United Front (RUF) led by Foday Sankoh and supported by Charles Taylor's Liberian National Patriotic Front (NPFL), entered eastern Sierra Leone from Liberia. The conflict would continue until 2002. Both the RUF and the NPFL leadership had received training in Libya and, according to western intelligence, held French third party tacit support via the Ivory Coast, from where Taylor launched his Liberian rebellion.[791] Then Ivorian President Felix Houphouet-Boigny held very close relations with then Parisian mayor, Jaques Chirac.[792] The NPFL was also actively engaging the CIA.[793] The war caused the deaths of tens of thousands of Sierra Leoneans. The war also caused over one million people to be internally displaced, 500,000 to become refugees, and upwards of 400,000 to survive the amputation of one or more limbs.[794]

In 1992 a group of Sierra Leone Army (SLA) soldiers venting discontent at non-payment and corruption within the APC government conducted a coup, establishing the National Provisional Ruling Council (NPRC). In attempting to better engage the RUF, the NPRC expanded the armed forces three-fold to 10,000 troops.[795] However, the majority of recruits were uneducated and unemployed youths mainly from the streets of Freetown who received inadequate training before deployment.[796] Despite widespread human rights abuses committed by the NPRC, Western donors provided $324 million between 1992 and

[791] *Prosecutor v Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009.
[792] Ibid., 31441.
[793] Taylor Transcript, 16 November 2009, 31682-3.
[794] C. Schocken, "The Special Court for Sierra Leone: Overview and Recommendations," *Berkeley J. Int'l L* 20 (2002), 436.
[795] SL-TRC Report, Vol 3A, 2004, 159.
[796] Ibid., 159-161; Keen 2005, 99.

1995.[797] In 1995 the NPRC's greatest source of revenue, the Sierra Leone Ore and Metal Company (SIERMCO) and Sierra Rutile mines were captured causing rapid deployment of a British mercenary force to reinforce their recapture by the SLA.[798] It was at this point that the conflict seriosuly engaged the UK as a protector of its domestic patron against a perceived francophone agent – the RUF.

After the failure of the British mercenaries, Tony Buckingham, the senior director of a British firm, Branch Heritage Group, employed South African based mercenary group Executive Outcomes (EO). EO were contracted to secure Freetown, the Sierra Rutile mine and diamond fields before engaging the RUF elsewhere.[799] The EO bill was to be $2 million per month with credit extended to the government that would be repaid with 50% of the government's tax revenue from a re-opened Sierra Rutile mine.[800] Branch Heritage Group's objectives were informed by a relationship with Sierra Rutile as well as future diamond mining concessions for its subsidiaries.[801] In July 1995 EO sister company and Branch Heritage Group subsidiary, Branch Energy secured diamond mining concessions of extractable value cited at $2 billion, carrying all the risk for the security of the concession

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[797] Keen 2005, 160.

[798] SL-TRC Report, Vol 3A, 2004, 197, 187, 203; D. Francis, "Mercenary intervention in Sierra Leone: Providing national security or international exploitation?" *Third World Quarterly* 20(2) (1999), 319-338; D. Avant, *The Market for Force: The Consequences of Privatizing Security,* Cambridge: Cambridge University Press, 2005, 85; A. Vines, "Gurkhas and the Private Security Business in Africa," in Jakkie Cilliers & Peggy Mason (eds.) *Peace, Profit or Plunder? The Privatization of Security in War-Torn African Societies,* Pretoria: Institute for Security Studies, 1999, 130.

[799] EO deployed 150 to 200 men and a helicopter gunship. Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry,* Ithaca, N.Y.:Cornell University Press, 2003, 104; Keen 2005, 151; D. Francis, 'Mercenary intervention in Sierra Leone: Providing national security or international exploitation?' *Third World Quarterly*, 20(2) (1999), 319-338; SL-TRC Report, Vol 3B, 2004, Accra: GSL Press, 68; Eeben Barlow, *Executive Outcomes: Against All Odds,* Alberton: Galago Publishing, 1999, 325, Avant 2005, 86; David Shearer, *Private Armies and Military Intervention*, Adelphi Paper 316 IISS, Oxford: Oxford University Press, 1998, 49.

[800] Avant 2005, 86.

[801] Sandline International. *Public Comment on Book Entitled 'Mercenaries – an African Security Dilemma',* 14 March 2000.

sites.[802] Sierra Leone's debt servicing at the time amounted to 75 per cent of annual exports.[803] The government began to adopt democratic posturing to solicit favorable terms of credit with donors.[804] This shift drove division within the NPRC causing Strasser's removal by Brigadier General Julius Maada Bio. Maada Bio attempted to stall elections until threatened with serious consequences by British and US Ambassadors.[805]

In 1996 NPRC advisor and SLPP stalwart Ahmed Tejan Kabbah won elections. Kabbah's victory was delegitimised by the rigging of polls in his native South.[806] President Kabbah continued peace negotiations with the RUF that culminated in the November 1996 Abidjan Agreement. The peace agreement provided amnesty to the RUF and removed Executive Outcomes from Sierra Leone in return for cessation of hostilities and disarmament.[807] EO had financed themselves to begin with and were only paid a third of what the government owed via an IMF loan and Branch Energy diamond mining concessions.[808] The Abidjan peace agreement did not hold. President Kabbah began to support a southern based para-military group called the Civil Defence Forces (CDF) at the expense of the SLA and the RUF who continued to procure arms. Distrust between the RUF and the government/CDF,

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[802] I. Douglas, "Fighting for diamonds – Private military companies in Sierra Leone," in J. Cilliers and P. Mason (eds.) *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* Pretoria: Institute for Security Studies, 1999, 179-180.
[803] Keen 2005, 161.
[804] Kandeh J, "Transition without Rupture: Sierra Leone's Transfer Election of 1996," *African Studies Review* 41(2) (1998), 392; SL-TRC Report, Vol 3A, 2004, 223; Keen 2005, 154; Amnesty International, *Sierra Leone: Towards a Future Founded on Human Rights,* London: 25 September 1996.
[805] J. L Hirsch., Sierra Leone*: Diamonds and the Struggle for Democracy,* Boulder, CO.: Lynne Rienner Publishers, 2001, 44.
[806] Southern irregularities included 345 per cent turn out in Pujehun, 155 percent in Bonthe, 139 per cent in Kailahun, 117 per cent in Kenema, and 90 per cent in Bo: Kandeh 1998, 98, 105.
[807] Peace Agreement between the Government of Sierra Leone and the RUF, Abidjan, Ivory Coast, 30 November 1996.
[808] SL-TRC Report, Vol 3B, 2004, 69; Sandline International. *Public Comment on Book Entitled 'Mercenaries – an African Security Dilemma',* 14 March 2000.

as well as between the government and the SLA began to manifest in armed clashes.[809] RUF leader Foday Sankoh was arrested in Abuja in March 1997. Continued armed confrontation was encouraged by a number of factors. Firstly, pledges of around $232 million in Demobilization, Disarmament and Reintegration (DDR) funding were inadequate and uncertain.[810] Instead, the World Bank increased Sierra Leone's debt burden by $15 million.[811] Secondly, recently defeated Northern-based APC politicians aligned themselves with the RUF and disaffected SLA against a common enemy, the SLPP and their southern based CDF supporters.[812] Thirdly, SLPP recrimination against the SLA, including cutbacks in military spending, and diversion of resources and political support towards the CDF drove SLA discontent to a dangerous level. That discontent prompted an SLA coup in May 1997 bringing the Armed Forces Revolutionary Council (AFRC) led by Major Johnny Paul Koroma to power.[813] Kabbah fled to Guinea. The AFRC contacted Foday Sankoh who was still in detention in Nigeria for carrying arms and asked him to order the RUF to join the AFRC in government. Sankoh agreed.[814] Britain's precarious status as exclusive patron of Sierra Leone now depended solely on a Southern militia – the CDF. The below table of political and military alignment of the parties demonstrates the UK's weakness at the time of the coup.

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[809] C. Fithen, "Diamonds and War in Sierra Leone: Cultural Strategies for Commercial Adaptation to Endemic Low-intensity Conflict." (unpublished PhD thesis, Department of Anthropology, University College London), 1999, 41.
[810] UN. *Report of the Secretary General on Sierra Leone,* 26 January 1997, S/1997/80, 7.
[811] Ibid.
[812] Kandeh 1998, 108; Lansana Gberie , "The May 25 Coup d'Etat in Sierra Leone: A Militariat Revolt?" *Africa Development* 22(3 and 4) (1997), 159.
[813] Keen 2005,197-201; SL-TRC Report, Vol 3A, 2004, 234-236.
[814] SL-TRC Report, Vol 3A, 2004, 245-246.

Figure 1: Military allegiance in Sierra Leone's conflict at May 1997

France (US, peripherally)	UK
SLA	
RUF	CDF
APC	SLPP

4.3 A US policy shift, and a conflict concludes

The SCSL, its financial supporters and much of the literature emphasize the compliance pull of the norm of international crimes prosecution.[815] The Security Council Resolution calling for the SCSL's establishment cited:

"The importance of compliance with international humanitarian law, and reaffirming further that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law"[816]

The following historical contextualization illuminates the more realist, rather than normative intent behind the SCSL's establishment. Changes in the local, regional and international security and political landscape shifted previously path dependent transitional

[815] C. Schocken, "The Special Court for Sierra Leone: Overview and Recommendations," *Berkeley J. Int'l L* 20 (2002); International Center for Transitional Justice. *Sierra Leoneans reflect on SCSL in 'Seeds of Justice'*, 11 July 2013.
[816] UN Security Council, *Security Council Resolution 1306 (2000)*, 5 July 2000, S/RES/1306.

justice goals re-shaping calculations about a war crimes court's utility. The limited number of States positioned to provide such a shift increased the capacity of those States to do so and the chance a shift could happen. The SCSL can be understood, like domestic institutions, as a bureaucracy vulnerable to State manipulation.[817]

Principal-agent theory also explains State delegation of case selection responsibility to the Special Court.[818] I argue that rational State actors tailored the discretion of prosecution case selection according to parameters of political expediency while deploying rhetorical language emphasizing the SCSL's embodiment of the norm of international crimes prosecution.[819]

The most important actor in the establishment of the SCSL was the US. The US, after 1997, had actively engaged the RUF's Liberian supporter Charles Taylor in diplomacy. Taylor had won seventy-five per cent of the vote in Liberia's July 1997 presidential election causing alarm for Kabbah and his British supporters in Freetown. The US had previously viewed Taylor and his NPFL insurgency as a conduit of French encroachment into the US sphere of influence in West Africa. However, George H.W. Bush's administration had decided that Liberia no longer constituted the U.S. 'special sphere' or

[817] Darren Hawkin, David Lake, Daniel Nielson, and Michael Tierney. *Delegation and Agency in International Organizations.* New York: Cambridge University Press, 2006.
[818] Pollack 2006.
[819] Ibid., 1.

protectorate.[820] This view was reinforced by Taylor's 1998 visit to Paris to declare Liberian plans for privatization and for French business to spearhead this process.[821]

Taylor received an official red carpet state welcome from President Chirac in Paris where the French foreign ministry stated its willingness to participate in Liberia's reconstruction and to develop a French-speaking environment. Taylor appealed for investment in iron ore and rubber industries as well as irrigation projects, infrastructural reconstruction, water and electricity supply, telecommunications, roads and health care.[822] An agreement was scheduled to be signed but was not made available to the public. Taylor's strong election victory and consolidation of support from previous political and military interlocutors meant his position in power in Liberia was now viewed by the US as a fait accompli. The marginal nature of US commercial interests in Liberia allowed Taylor to placate US irritation by addressing US security and strategic concerns.[823] The US allowed British-led sanctions on Taylor's then ally the AFRC/RUF Junta in Freetown while Russia, France and China blocked the use of force or the threat of force against the RUF citing issues of state sovereignty.[824] At the time, China and France were the largest recipients of Liberian timber. France received thirty-seven per cent of Liberia's official exports in 1999.[825]

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[820] Nicholas Rostow, Former Senior Policy Adviser to the U.S. Permanent Representative to the United Nations and General Counsel, U.S. Mission to the United Nations, 9 November 2012, Washington DC, USA, interview n°26.
[821] Star Radio, Liberian Daily News Bulletin, *All Africa.com*, 30 September 1998.
[822] Ibid.
[823] Taylor Transcript, 9 November 2009, 31354.
[824] Gberie 1997,166; Former Tunisian delegate to the UN Security Council, 11 June 2009, The Hague, The Netherlands, interview n°61; BBC News "Britain's Role in Sierra Leone," 10 September 2000.
[825] Global Witness, *Taylor-made The Pivotal Role of Liberia's Forests and Flag of Convenience in Regional Conflict*, September 2001, 17.

Since the beginning of Taylor's Liberian insurgency, he had held a long-standing, primarily iron ore and timber oriented commercial relationship with France. France did not want to compromise its commercial interests.[826] Britain pressured Nigeria to lead the Economic Community of West African States (ECOWAS) sanctions against the AFRC and send troops under the guise of ECOWAS peacekeepers to reinstate Kabbah.[827] The Nigerian deployment violated the Community of West African States Protocol on Non-Aggression.[828] On 1 June 1997 Kabbah stated over the British-funded[829] 98.1FM radio station that any person remaining in Freetown would be treated as a collaborator.[830]

On June 2nd, Freetown was bombarded by Nigerian naval vessels and then invaded by the Economic Community of West African States Monitoring Group (ECOMOG) troops who eventually returned Kabbah to power in 1998. Without US support for military intervention, the British utilized Nigerian economic and military pressures to press the Junta to negotiate. Under the October 1997 Conakry Peace Accord it agreed to return power to Kabbah within 6 months in return for AFRC amnesty.[831] The RUF were marginalized at the peace talks by the AFRC. Despite the agreement, hostilities between the AFRC and British-supported ECOMOG troops ensued. Not trusting the junta to stick to its word, the British government continued to support the CDF through its leader, Sam Hinga Norman in violation of UN sanctions the UK had proposed and saw implemented in

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[826] Interview61, 2009.
[827] Ibid.
[828] ECOWAS Protocol on Non-Aggression, signed in Lagos on 22 April 1978.
[829] SL-TRC Report, Vol 3A, 2004, 298.
[830] Ibid.
[831] Conakry Peace Plan, *Agreement between the Armed Forces Revolutionary Council and ECOWAS,* 23 October 1997.

October 1997.[832] The private military company, 'Sandline', located in the same London offices as Diamond works/Branch energy and comprised of many former Executive Outcomes members, was introduced to Kabbah. UK intelligence reports referred in some instances to Sandline as 'Executive Outcomes/Sandline'.[833] It agreed to provide troops, arms and equipment including military helicopters as well as to plan and coordinate pro-government attacks against the AFRC. The plan included attacks from Liberia using Liberian fighters transported by ECOMOG from parts of Liberia not controlled by Taylor.[834] This military support, which was supported logistically by the UK military, violated a then active UK arms embargo on Sierra Leone as well as the UN embargo lead by Britain.[835]

With Taylor's domestic strength proven, the US began to engage him diplomatically in order to secure vital strategic interests, namely its Liberia-based Omega navigation system upon which its navy in the Atlantic relies. Taylor's newly founded alliance was also a product of his savvy lobbying of the Black congressional caucus in Washington D.C.[836] In February 1998, while the British were employing a mercenary force to remove the AFRC and secure British diamond mining concessions,[837] President Taylor was striking a personal bond with US Special Envoy for the Promotion of Democracy and Human Rights

[832] Gberie 1997, 166; Interview61, 2009; BBC News "Britain's Role in Sierra Leone," 10 September 2000.
[833] Taylor Transcript, 5 November 2009, 31209.
[834] SL-TRC Report, Vol 3A, 2004, 289; UK House of Commons, *Foreign Affairs Select Committee Report,* Foreign Affairs Committee Publications, 3 February 1999; Taylor Transcript, 5 November 2009, 31209-10.
[835] Gberie 1997, 166; Interview61, 2009; BBC News "Britain's Role in Sierra Leone," 10 September 2000.
[836] Jesse Timmerman, "Liberia and Blood Diamonds" *Insight Magazine,* 25 July 2003; Ismail Rashid, "The Lome peace negotiations," *Conciliation Resources*, September 2000.
[837] SL-TRC Report, Vol 3A, 2004, 291-2; Francis 1999, 328; *Legg* and *Ibbs,* Report of *the Sierra Leone Arms Investigation,* 27 July *1998*, HC 1016, 28; Keen 2005, 218.

in Africa, Jesse Jackson.[838] In October 1998 Jackson personally intervened to stop Kabbah executing Foday Sankoh who had been handed over to Kabbah by Nigerian forces in order to be tried for treason.[839]

Nigerian support for British interests in Sierra Leone waned somewhat, after Sani Abacha's 1998 death. A decline in ECOMOG support limited Kabbah's capacity to maintain security around Freetown.[840] This culminated in the January 1999 invasion of Freetown by mainly former AFRC and other SLA soldiers.[841] In March 1999, an impending drawdown of Nigerian support[842] and continued US and French support for Taylor, and by extension the RUF, caused Britain to concede a diplomatic solution was the only military option available. UK Foreign Minister Robin Cook, summoned Kabbah to a meeting with French Foreign Minister Hubert Vedrine in Abuja. Cook instructed Kabbah to pursue dialogue with the RUF.[843] The US, specifically Special Envoy Jesse Jackson and US Ambassador to Sierra Leone, Joseph Melrose reinforced their pro-RUF position by intercepting Kabbah at a May conference in Ghana. Taylor had lobbied US Congressional Black Caucus Chairman, Rep Donald Payne, to convince Jackson to push for negotiated settlement in Sierra Leone, rather than congressional support for military assistance to ECOMOG.[844] Jackson and Melrose persuaded Kabbah, without opportunity to consult his ministers, to go with them to Lome and negotiate with Sankoh.[845]

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[838] Timmerman July 2003; Rashid September 2000.
[839] Timmerman July 2003.
[840] University of Pennsylvania, African Studies Center "IRIN Update 420 for 11 March 1999."
[841] SL-TRC Report, Vol 3A, 2004, 324-5.
[842] University of Pennsylvania, African Studies Center "IRIN Update 420 for 11 March 1999."
[843] Keen 2005, 250.
[844] Rashid September 2000
[845] Timmerman July 2003; Rashid September 2000; Keen 2005, 251.

Kabbah and Sankoh eventually agreed power sharing, amnesty for crimes committed and the replacement of ECOMOG by a UN force. Though the negotiated amnesty was supported by all parties, including President Clinton, who personally called Sankoh to encourage him to sign the Lome Peace Agreement,[846] the UN Secretary General's representative to the negotiations appended a last minute reservation stating the UN did not regard amnesty as applying to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.[847] Sankoh, in retaliation for his marginalization by Johnny Paul Koroma in the Conakry negotiations, had marginalized Koroma and other senior SLA officers from negotiations at Lome. SLA leader, Johnny Paul Koroma, who was briefly taken captive by RUF field commander Sam Bockarie, released a statement rejecting the imposition of RUF negotiated terms.[848] Kabbah attempted to appease Koroma's exclusion by placing him in charge of the body charged with implementing the Lome Accord.[849]

Miles Kahler's explanation of a preference for legalized agreements to deepen norms and further State interests appears to be applicable to the Lome Peace Agreement.[850] The US and the RUF leadership wished to politically entrench the military status quo by acquiring political power, albeit shared with the Kabbah government, and procuring external legitimacy and material support. The UK and the Kabbah government viewed the agreement unfavorably but were overwhelmed by US coercion while securing what Snidal

[846] Timmerman July 2003; Collier 2000, VII.
[847] UN, *Eighth Report of Secretary-General on the United Nations Assistance Mission in Sierra Leone,* 31 July 2000, S/2000/751.
[848] SL-TRC Report, Vol 3A, 2004, 343-4.
[849] Ibid., 343, 344; Sierra Leone Web Archives October 1999.
[850] Miles Kahler, "The causes and consequences of legalization," *International Organization* 54(3) (2000), 661-683, 662.

would suggest[851] was a credible commitment from a stronger military party, the RUF and SLA, to cease hostilities. After the Lome Accord, Jesse Jackson continually reassured Sankoh of political support and immunity from prosecution. Jackson had agreed that the US would fund 30 per cent of the disarmament and demobilization process.[852] Sankoh's new post as Minister of Minerals and Mines accompanied by a luxurious home in western Freetown incentivized his attempt to make the peace agreement work. However, he was losing the support of RUF combatant cadres. RUF combatants viewed the Lome Accord as requiring disarmament and accompanying loss of rent seeking power so RUF elites could profit from government positions. An estimated ninety per cent of diamonds were exported through illegal channels with RUF commanders in the field controlling much of the trade.[853]

The RUF was now beginning to fracture as Sankoh quickly lost control of key battlefield commanders.[854] Despite an October 1999 Security Council Resolution creating a United Nations Mission in Sierra Leone (UNAMSIL) to implement disarmament and demobilization,[855] only half of the pledged US$50 million had been received by mid-December 1999.[856] That lowly figure, compared to the US$692 million pledged in 2002, demonstrated the absence of Security Council consensus on Sierra Leone.[857] Weak consensus at the Security Council demonstrated the absence of hegemonic stability that

[851] Ibid., 661-683, 663.
[852] Timmerman July 2003; Sierra Leone Web Archive, May 2000.
[853] SL-TRC Report, Vol 3A, 2004, 351.
[854] Ibid., 355.
[855] UN, *UN Mission for Sierra Leone to aid with Implementation of Lome Peace Agreement,* 22 October 1999, SC/6742.
[856] US Committee for Refugees, *Sierra Leone's Path to Peace: Key Issues at Year's End,* Press Release 15 December 1999.
[857] J. Porter, "The Interaction between Political and Humanitarian Action in Sierra Leone 1995-2002," Geneva: Centre for Humanitarian Dialogue, March 2003.

would accompany more assertive US policy or Anglo-American consensus. It also demonstrated the ambivalent attitude of more senior personnel in the Clinton Administration, suggesting the absence of hegemonic assertiveness. The British were unenthused by Lome and the incorporation of RUF elements in government.[858] However, their position was opposed by the US. US Secretary of State, Madeleine Albright, made an October visit to Sierra Leone where she met Foday Sankoh. After the meeting Albright stated that "Sankoh is delivering the right message" and that she "hoped very much he will continue to intensify his efforts to insure full adherence to the Lome Accord".[859]

Peace negotiations had fractured both the Sierra Leone armed forces and the RUF. Neither exercised real control over their combatants as rogue commanders asserted independence by harnessing localized resources in their respective provinces. In February 2000, as RUF reluctance to cooperate in the provinces became clear, the Security Council decided to expand the military component of UNAMSIL to 11,000 troops as well as its mandate to assist Sierra Leonean law enforcement.[860] Up until this point, the credible commitment of a path dependent process of amnesty for all parties, entrenched by the Lome Peace Agreement, appeared to be gaining international traction. The UK, however, was to begin a sophisticated campaign to shift the US position. It sought to influence the military dynamic on the ground dramatically in favor of the Kabbah government while rewriting the accompanying narrative. It further sought to play partisan domestic US politics to cause a democratic Whitehouse to change position. The narrative was one that Human Rights groups and lower level State Department bureaucrats that perceived themselves as

[858] Interview61, 2009.
[859] Norimitsu Amishi. "How U.S. left Sierra Leone tangled in a curious web," *New York Times*, 4 June 2000.
[860] UN, Press Release 7 February 2000, SC/6801.

progressive would adopt.[861] Secretary of State Albright had sent a letter to Sankoh and Koroma informing them that they would be held accountable for any subsequent atrocities against civilians.[862] The US took the position that atrocities committed after Lome were not covered by the Amnesty.[863] A gulf opened between the US actors in Freetown who were more engaged in the peace process and the diplomatic core in Washington who had only a superficial understanding of culpability for the breakdown of the Lome Peace agreement.[864]

The British armed forces began to liaise with a group of militant anti-Taylor Liberian diaspora called the Liberians United for Reconciliation and Democracy (LURD).[865] Critically, the British government, through their Ambassador to the US, brought the issue of US support for Charles Taylor to the attention of Republican Senator Judd Gregg.[866] A staffer to Senator Gregg noted, "We sat down with the British Ambassador on Sierra Leone and he took a very different position to the Clinton position and there was a mutual commiseration and there was a negotiation as to how do we do something about the US policy."[867] Senator Gregg was the chairman of the US Senate homeland security appropriations sub-committee. He used this position to block $96 million for disarmament

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[861] David Scheffer, *All the missing souls: A personal history of the war crimes tribunals*, Princeton, NJ: Princeton University Press, 2012, 313.
[862] Scheffer 2012, 314.
[863] Ibid., 315.
[864] On a visit to Freetown, US Ambassador for War Crimes, David Scheffer informed the US Ambassador that the RUF were spitting their face through their failure to comply. Scheffer 2012, 319.
[865] International Crisis Group, "Liberia: The key to ending regional instability," *Africa Report* 43, 24 April 2002.
[866] Kevin Linskey, Former staffer to Senator Judd Gregg, 13 December 2010, Washington D.C., USA, interview n°73.
[867] Linskey, 2010.

and demobilization funds earmarked for Sierra Leone without hearings, debate or votes.[868] The Security Council subsequently failed to provide adequate funding for disarmament and demobilization programs such as lump-sum payments and education or vocation programs that provide combatants alternatives to militancy.[869] The Sierra Leone UN funding represented the only real incentives for ordinary RUF combatants to disarm.

Senator Gregg opposed the Lome accord, an RUF role in government, Charles Taylor's role in the region and the support he enjoyed from the Clinton administration.[870] Senator Gregg, a fiscal conservative, had also impeded payments on $1.77 billion owed to the UN by the US.[871] Gregg had argued that the money would be better spent domestically and that peacekeeping instead of peace making was ineffectual.[872] The State department had rejected this argument by asserting that the $1.77 billion was not money being considered, but rather money owed and already budgeted for. However, Senator Gregg as chair of the Republican controlled appropriations committee continued to refuse to approve the budget until US policy toward the region changed.[873]

Identifying and tracing the external role of Senator Gregg, Richard Holbrooke and the British government, as well as the security and political developments within Sierra Leone illuminates the realist state interests behind the a shift of transitional justice preference

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[868] Tim Weiner, "Solitary Republican Senator Blocks Peacekeeping Funds," *New York Times*, 19 May 2000.
[869] UN, *Fourth Report of the Secretary General on the United Nations Mission in Sierra Leone,* 19 May 2000 S/2000/455, 3.
[870] Tim Weiner, "G.O.P. Senator frees millions for U.N. mission in Sierra Leone," *New York Times*, 7 June 2000; Sierra Leone Web Archive, June 2000.
[871] Tim Weiner, "Solitary Republican Senator Blocks Peacekeeping Funds," *New York Times*, 19 May 2000.
[872] Victoria Holt, Former staffer to US Ambassador to the UN, Richard Holbrooke, 13 January 2011, via phone, interview n°50; Linskey, 2010.
[873] Holt, 2011.

from a truth commission to the SCSL. Gregg's withholding of UN money posed the first significant challenge to US policy in Sierra Leone and Liberia. Kabbah utilized RUF non-compliance to justify continued non-implementation of his Lome Accord obligations to provide specific RUF postings in government.[874] While legislation was passed to create a SL-TRC in February 2000, as required under Lome, other Lome elements including many government RUF positions were not provided. Large elements of the RUF, now exercising a great deal of autonomy from the leadership, refused to disarm while compensation or education for handing over weapons was not available. Non-compliance from both sides fermented tensions between the two parties. However, a continuously engaged UK government drove a narrative that cited RUF non-disarmament as the sole driver of post-Lome instability. The mass media and norm entrepreneurs adopted this narrative. Little attention was drawn to the non-disarmament of the CDF, non-provision of disarmament and demobilization programs or the Kabbah government's refusal to fulfill its Lome obligations in providing RUF appointments. The UK goal was to deeply align the norm of international crimes prosecution with the need for a military that provided the Kabbah government, and UK interests, complete victory.

By May 2000, hostilities between the RUF and UNAMSIL as well as the SLA and UNAMSIL had been escalating. In the first week of May, RUF combatants, under pressure to disarm without compensation, seized over 550 UNAMSIL peacekeepers. Four peacekeepers were killed and three injured.[875] The government described the fracas as hostile RUF action against a democratic government – a narrative actively deployed by the

[874] SL-TRC Report, Vol 3A, 2004, 249; UN, *Fourth Report of the Secretary General on the United Nations Mission in Sierra Leone,* 19 May 2000, S/2000/455, 3.
[875] SL-TRC Report, Vol 3A, 2004, 358.

British government and adopted by the mass media.[876] Discontent within UNAMSIL was evident in a report by force commander Major-General Vijay Jetley who accused ECOMOG, including its Commander Maxwell Khobe, of facilitating RUF diamond mining for personal gain.[877] Charles Taylor was now profiting more from the rogue commanders Sankoh no longer controlled, than from Sankoh himself.[878] Jesse Jackson, not knowing of Sankoh's impotence in relation to his RUF subordinates, continued to assure him of immunity while requesting he order the peacekeepers release.[879] The peacekeeper hostage taking appeared to bring US and British policy tangentially together in that they both condemned the RUF for alleged behavior in violation of international norms. The US government accepted the British narrative. However, it continued to support Taylor, and by extension the RUF.[880] Kabbah was now utilizing distrust between Johnny Paul Koroma and Sankoh to procure the allegiance of Koroma, and those SLA loyal to him. During the first week of May, Koroma's SLA were operating alongside the CDF in Freetown arresting, and in some cases murdering, senior RUF figures. Kabbah announced that Sankoh had been placed under house arrest.[881] Jesse Jackson was now attempting to resolve the crisis by pushing Charles Taylor to convince RUF commanders to release peacekeepers.[882] Since the Lome Peace Agreement, The Clinton Administration had been comparatively disengaged.

[876] Ibid., 415-421, 245-249.
[877] Vijay Jetley, *Report on Crisis in Sierra Leone*, May 2000.
[878] Global Witness, *For a Few Dollars More: How al Qaeda moved into the Diamond Trade,* London: April 2003, 40-7; Keen 2005, 253.
[879] Timmerman July 2003.
[880] SL-TRC Report, Vol 3A, 2004, 373; Interview61, 2009; UN, *Statement by the President of the Security Council*, 4 May 2000 s/prst/2000/14.
[881] SL-TRC Report, Vol 3A, 2004, 405-406, 233, 393, 377.
[882] Timmerman July 2003.

On 8 May 2000, under instruction from President Kabbah, CDF and Johnny Paul Koroma-aligned SLA attacked Sankoh's residence under cover of civilian protest at continued peacekeeper detention by the RUF.[883] In response to the attack on Sankoh's residence, the RUF marched on Freetown but were met and repelled by a coalition of SLA, CDF, ECOMOG and British troops coordinated, armed and trained by the British.[884] Judd Gregg continued to block US contributions to UNAMSIL until 'Lome was abandoned' and any peacekeeping mission was used to undermine Charles Taylor's influence in Sierra Leone.[885] He also called for "an international war crimes tribunal to investigate and punish atrocities committed by the RUF to be set up", the first time such a tribunal had been publicly proposed.[886]

The British government had successfully crafted a narrative intertwining the normative prohibition of behavior in breach of a peace agreement with its interests, while fundamentally shifting the security dynamic on the ground. The reconfiguration appeared as follows:

Figure 2: Military allegiance in Sierra Leone's conflict at May 2000

France (an increasingly cautious US)	UK
APC	SLPP

[883] SL-TRC Report, Vol 3A, 2004, 415-421, 245-249.
[884] Ibid., 331, 457-8; International Crisis Group, "Liberia: The key to ending regional instability," 24 April 2002; BBC News "Britain's Role in Sierra Leone," 10 September 2000.
[885] Judd Gregg, "A Graveyard Peace," *The Washington Post,* 9 May 2000.
[886] Ibid.

RUF	CDF
	SLA
	ECOMOG

Despite holding little influence over commanders in the field, being marginalized in the government by Kabbah, and being attacked by Kabbah-aligned forces, inaccurate reporting of events meant Sankoh was held responsible for the insecurity of early May by the international media, the Security Council, and most critically, both the US and British governments.[887] Intelligence officers were also used to feed stories of evidence proving Charles Taylor's role in trading diamonds with the RUF to the press.[888] Despite President Clinton and UN Secretary General Kofi Annan reviewing the Sierra Leonean situation, and the UK demanding Sankoh be held accountable, Jesse Jackson continued to spearhead US diplomacy which, along with France, China and Russian positions, sought political settlement.[889] While the British were lobbying feverishly to develop political consensus to finish the RUF off, Jackson compared the RUF to the African National Congress in South Africa before it came to power. He also called for Sankoh to be found, assured his safety and stated that his voice should be heard.[890]

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[887] UN, *4139th meeting of the Security Council*, 11 May 2000, S/PV.4139; UN, *Secretary General Pleads with Council not to Fail People of Sierra Leone, Africa,* Press Release 11 May 2000, SC/6857; Scheffer 2012, 320-30.

[888] The Washington Post reported that documents were found at Sankoh's house referring to Charles Taylor's role in trading diamonds with the RUF. The letter referred to in fact referred to a Charles who was the son of the head of the diamond buyers' association in Antwerp see Taylor Transcript, 5 November 2009, 31248-51.

[889] UN, *Secretary General Pleads with Council not to Fail People of Sierra Leone, Africa,* Press Release 11 May 2000 SC/6857; Scheffer 2012, 320-30.

[890] Interview61, 2009; Sierra Leone Web Archive, May 2000

Jackson's comments were received with vitriol in Freetown where civil society and the government blamed the RUF for the January 1999 invasion and the breakdown in security. When Jackson was informed he would be physically assaulted were he to travel to Freetown he amended his schedule to visit Liberia in order to urge Taylor to rapidly secure the release of the hostages. He continued to emphasize however, as did Taylor, that Sankoh had a role to play in peace negotiations.[891] In his 19 May meeting with Jackson, Taylor stated that he did not control the RUF but summoned Sam Bockarie, who was then in Monrovia, to meet Jackson.[892] Jackson assured Taylor that the US government had not yet taken a position on forming a tribunal as had been called for by HRW.[893] The US War Crimes Ambassador was already considering whether criminal liability could be attached to Taylor were a tribunal to be created.[894] British policy appeared to be at loggerheads with the other permanent members of the Security Council, including the US. However, the British and Kabbah governments' management of information coming out of Sierra Leone developed and consolidated perceived sole RUF responsibility for the breakdown in security. The RUF's emerging diplomatic stigmatization was reinforced by the government's arrest and detention of 180 suspected RUF members including the Freetown leadership.[895]

By the end of May UNAMSIL peacekeepers were actively fighting alongside SLA and CDF militia against the RUF who still controlled half the country and an estimated 90 per

[891] Timmerman July 2003; BBC News, "The Strange Tale of Sankoh's Capture," 18 May 2000; p447 MPA.
[892] Taylor Transcript, 9 November 2009, 31383-5.
[893] Ibid, 31396.
[894] Scheffer 2012, 322.
[895] SL-TRC Report, Vol 3A, 2004, 449, 451, 454.

cent of the diamond trade.[896] However, a seismic shift in the UN was occurring. The policy of the Republican-controlled Senate Appropriations sub-committee was about to win out over the Democrat-controlled State Department. The mass media and norm entrepreneurs adopted narratives ascribing RUF culpability and the legitimacy of ostensibly impartial peacekeepers fighting alongside pro-government forces.[897] Strikingly, human rights groups also laid sole blame for abuses at the feet of the RUF.[898] On 3 June 2000, Judd Gregg and US Ambassador to the UN, Richard Holbrooke, along with their respective staffers, met to discuss US policy towards Sierra Leone and Liberia.[899] Gregg made the case that the US was using taxpayer dollars for ill-informed policy and that US money owed to the UN would remain withheld until that policy changed. Gregg viewed a sufficient change as a policy that sought Taylor's removal from power in Liberia.[900] Holbrooke agreed that a strategy was required to remove Taylor and suggested a four-pronged approach.

The four instruments Holbrooke suggested included:

1. An armed insurgency into Liberia launched from Guinea and well capacitated peace enforcement in Sierra Leone;
2. Economic sanctions weakening both Taylor's capacity to repel an insurgency and the RUF's capacity to repel peace enforcement;
3. A war crimes tribunal that would indict Taylor and legitimise his diplomatic and economic isolation

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[896] Ibid., 460.
[897] See for example: Tony Karon, "In Sierra Leone: Saving hostages may cost dearly," *CNN*, 16 May 2000; BBC News, "India concerned about hostage peacekeepers," 9 June 2000.
[898] Member SCSL-OTP, 26 August 2010, via telephone, interview n°71.
[899] Holt,,2011; Linskey, 2010; Former staffer to Senator Judd Gregg, US Senate, 13 December 2010, via telephone, interview n°44; Scheffer 2012, 322.
[900] Holt, 2011; Linskey, 2010.

4. Proactive support of Liberian political opposition.[901]

It was hoped that one, or a combination of these methods would force Charles Taylor to leave power and the RUF to surrender.[902]

Jesse Jackson's language suddenly became more conciliatory to the pro-Kabbah narrative. Jackson belatedly began to cite Senator Judd Gregg's blockage of UNAMSIL funds as the impediment to the hostages' release, while warning the RUF to either disarm voluntarily or be disarmed by force.[903] On June 2 Kofi Annan and fifteen Security Council members headed on a two-day retreat at which the Sierra Leonean situation was discussed.[904] Indications of an Anglo-American compromise could be seen in a statement from Kabbah's government that private security firms from either the US or Britain would be contracted to provide security in the diamond mining areas. Charles Taylor's pledge of 3000 troops to an ECOWAS peacekeeping force in Sierra Leone, and his call for Sankoh to be moved to a third country also indicated that he was resigned to an RUF military defeat.[905] The UK government with allies of convenience in Washington D.C. had shaped the narrative and the agenda for the design of a tribunal.

4.4 Court Design

On 5 June the US State Department stated it was in consultation with the UN and the UK to bring perpetrators of crimes in Sierra Leone to justice, indicating that crimes committed

[901] Ibid.
[902] Ibid.
[903] Sierra Leone Web Archive, May 2000.
[904] Sierra Leone Web Archive, June 2000.
[905] Ibid.

since the Lome Amnesty were not covered by it.[906] This implied the US considered that crimes committed prior to Lome were, indicating an amnesty for all crimes prior to 7 July 1999. This would have been a severely constrained temporal jurisdiction, comparative to the conflict. Jesse Jackson was fired as Special Envoy for the Promotion of Democracy and Human Rights in Africa and the next day US senator Judd Gregg released $368 million in peacekeeping funds he had been blocking ($96 million for Sierra Leone). Gregg demanded accountability while stating he had received an assurance Sankoh would play no role in Sierra Leone's future, that the Lome Accord was hopefully dead, and that RUF control over diamonds would be broken.[907]

Gregg claimed that his blockage of US funds totaling $368 million for four UN missions, had forced the Clinton administration to alter its foreign policy, a claim US representative to the UN, Richard Holbrooke appeared to confirm.[908] Until this time, the Clinton administration had termed Senator Gregg's blockage of the funds "a grave mistake."[909] With the continued absence of funding for disarmament, the Clinton administration officially indicated its shift in policy in a letter to Senator Gregg from Mr. Holbrooke. The letter stated that Mr. Sankoh should have no political future, that the UN should try to disrupt the RUF's hold on diamonds, and that the US should come up with a strategy to deal with Liberian President Charles Taylor.[910] The terms of the letter and the release of

[906] Ibid.
[907] Ibid.
[908] Tim Weiner, "G.O.P. Senator frees millions for U.N. mission in Sierra Leone," *New York Times*, 7 June 2000.
[909] Ibid.
[910] Ibid.

the UN funds had been negotiated by Senator Judd Gregg in a meeting with Ambassador Holbrooke.[911] On June 6, Senator Judd Gregg made the following statement:
"The United States will not turn a blind eye to the rape of the people and of the land of Sierra Leone. We will demand that brutal thugs are held accountable for their atrocities and regional troublemakers must look with fear to their own future."[912]

When read in the context of Senator Gregg's public opposition to US support for Taylor's role in Sierra Leone, this statement may have served as an ominous, but implicit sign to Taylor.

4.4.1 Securing consensus for a fiscally dependent court

The form accountability would take was unclear as the US and Britain began to negotiate the possibility of a tribunal. France, Russia and China opposed a tribunal that could prosecute a Liberian national. The three permanent Security Council members made it clear they would block the creation of a UN organ and the use of UN funds for what they viewed as 'dealing with Liberia through the back door'.[913] They concluded that such a tribunal should be funded by the US and Britain themselves.[914] The US and Britain also favored a hybrid model indicating that it would be less costly than the cumbersome ICTR and ICTY predecessors.[915] Taking on the fiscal cost of the Court had eliminated two key transaction costs. The first is bargaining cost of Court negotiation with both civil society actors and other Security Council States. The only substantive negotiation the UK and the

[911] Linskey, 2010.
[912] Sierra Leone Web Archive, June 2000.
[913] Interview61, 2009.
[914] Ibid.
[915] Ibid.

US were required to have would be with a weak Government of Sierra Leone that they, as strong powers, could coerce into compliance.[916] The diminished need to negotiate, also provided greater and uncontested discretion to the US and, to a lesser extent, the UK, to design the Special Court. Braithwaite and Drahos assert that actors outside the great power constituency confront regulatory capture.[917] However, the communication of deficiencies and biases against affected constituencies, as well as the engagement of entrepreneur collaboration, as required by Mattli and Woods,[918] had only a peripheral impact.

The following section demonstrates the marginal impact of the UN Secretariat and disinterested members of the Security Council against US design preferences. Three key instruments the US were able to wield comparative to their influence at the ICTR, were: enhanced control over jurisdiction, the selection of key personnel, and financial leverage over those personnel. The functional controls provided an insurance policy in case prosecutorial actors, acting within jurisdictional controls, exercised their mandate against the interests of the designing actors. The designing circumstances of near exclusive US design, empowered what Goldstein et al. would consider the 'pragmatists' at the expense of the 'legalists'.[919]

It is important that we understand the emergence of a common US/UK approach in terms of the diplomatic; military; and popular narrative of the war. The increasing strength of this

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[916] Daniel Drezner, *All Politics Is Global: Explaining International Regulatory Regimes,* Princeton: Princeton University Press, 2008.
[917] John Braithwaite and Peter Drahos, *Global Business Regulation,* Cambridge: Cambridge University Press, 2000.
[918] Mattli and Woods 2009.
[919] Goldstein et al. 2000.

emerging relationship and the relative weakness of other voices, defined the landscape in which the Court's design was conceived. On 8 June the UK Representative to the UN, Jeremy Greenstock stated a comprehensive resolution was being proposed to expand the UNAMSIL force, to bring to justice those that had attacked peacekeepers and committed violations of international law and address the illegal RUF trade of diamonds for arms.[920] The US Government met with Sierra Leone's Attorney General, Solomon Berewa, who suggested that he serve as co-prosecutor of an international tribunal for Sierra Leone, a position the Kabbah government supported.[921] The British and Sierra Leonean governments, sought to assert as much case selection control as possible including by locating the Court within the Sierra Leonean legal system, providing the Kabbah government greatest capacity to protect itself, and the British government from prosecution.[922] The British would continue to advocate for a domesticated Court despite realizing a regime change may wipe out such a process.[923] Their position was rejected by the US and they, along with the Sierra Leonean government, accepted a 'coestablishment process'.[924] Kabbah wrote a letter to the Security Council requesting it to establish an international criminal tribunal.[925] However, the British continued to assert the avoidance of a Carla Del Ponte-type prosecutor that might investigate British culpability or otherwise act outside political parameters, as she had by investigating NATO and the RPF.[926] On 12 June President Kabbah wrote to the UN Security Council requesting it to set up a 'Special Court for Sierra Leone' to "try to bring to credible justice those members of the RUF and

[920] Sierra Leone Web Archive, June 2000.
[921] Scheffer 2012, 323, 328.
[922] Ibid., 323, 330.
[923] Ibid., 330.
[924] Ibid. 2012, 330-1.
[925] Interview61, 2009.
[926] See Chapter three. Scheffer 2012, 331.

their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of UN peacekeepers as hostages".[927]

The Secretary General sent a senior legal officer to Freetown to meet with the Sierra Leonean government that expressed a clear preference for "a national court with a strong international component".[928] After a closed session on 21 June, the Security Council found that the RUF had violated the Lome Peace Agreement and that those responsible for taking UN peacekeepers hostage should be 'brought to justice'.[929]

The US position in Sierra Leone was linked to Liberia – a shift against the RUF meant a shift against Charles Taylor. The possibility that US and British policy now sought to place at its forefront human rights and an end to civil conflict in West Africa by creating an international criminal tribunal was dispelled when it became apparent that the US was now militarily supporting a loose coalition of anti-Taylor forces, the LURD.[930]

The LURD were similar in nature to Taylor's NPFL insurgency in terms of their inclination to violate international humanitarian law. The leading figures comprising the LURD had gathered in Freetown in February 2000 and had established liaisons with the British military.[931] In July, the LURD, who were then in contact with military officers from

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[927] UN, *Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council*, 10 August 2000, S/2000/786, 2.
[928] UN, *Fifth* report *of the* Secretary-General *on United Nations Mission in Sierra Leone*, 31 July 2000, S*/2000/751.*
[929] UN, *Official communiqué of the 4163rd meeting of the Security Council*, June 2000, S/PV.4163 21.
[930] International Crisis Group, "Liberia: The key to ending regional instability," Africa Report 43, 24 April 2002; Linskey, 2010.
[931] Ibid.

both the US and Britain, attacked North Western Liberia from Guinea.[932] Guinean leader Lansana Conte had been a strong US ally in the region. Guinean forces were provided with increased US military training and ammunition for their offensive against Taylor in Liberia.[933] Continuing UN sanctions impeded the Liberian government from legally acquiring arms to defend its territory. Conscious that more than a quarter of US hydrocarbon supplies would soon be procured from the region (greater than that procured from the Middle East), that lucrative fields exist off the Liberian[934] and Sierra Leonean coast, and that China is perceivably emerging as an influential Liberian partner,[935] securing friendly stability became a greater US priority.[936] Taylor had allegedly preferred French mining exploration.[937] The Liberian Government appealed to the Security Council with support from ECOWAS, France, China and Russia to lift the sanctions but the UK and US remained steadfastly opposed.[938]

The US diplomatic shift in policy against Taylor did not come as quickly as it had militarily. The US had to lobby other Security Council members in order to gain support for a tribunal. Some members felt a court was being established to assist efforts to remove Taylor, and were alarmed as to a perceived legal trend that impinged upon State

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[932] Ibid.
[933] Ibid.; Taylor Transcript, 9 November 2009, 31332-3; US House of Representatives, Hearing before Subcommittee on Africa, Global Human Rights and International Relations, *The impact of Liberia's election on West Africa*, 8 February 2006.
[934] An estimated 1.5 billion barrels of oil is estimated to be in Liberian waters. US based company Chevron and a Nigerian firm Oranto have subsequently been provided concessions by Ellen Johnson-Sirleaf's Liberian government; The Analyst, "Oil manoeuvres: Hopes, woes, worries in wait," 1 September, 2010.
[935] This emerging influence is perceived to be emerging Chinese commercial interests as well as China's first foray into peacekeeping.
[936] US House of Representatives, 2006; Report of the National Energy Policy Development Group, US Government Printing Office, May 2001, Chapter 8.
[937] The Analyst, "Oil manoeuvres: Hopes, woes, worries in wait," 1 September, 2010.
[938] Interview61, 2009; Taylor Transcript, 9 November 2009, 31338-9.

sovereignty.[939] On the 5th of July, the Security Council criminalized trading in Sierra Leonean diamonds.[940] On 30 July the US gave Taylor two to three weeks to come up with a proposal to end the conflict or face sanctions, informing him that if he was "not willing to play this positive role in word and deed, there will be very negative consequences for our bilateral relations and…for Liberia's relations with the entire international community".[941] While Taylor secured the release of UN hostages held by the RUF he continued to arm RUF combatants.[942]

Attempts to appease the US with conciliatory actions and to utilize diplomatic patrons in both the Democratic and Republican parties appeared impotent against the new anti-Taylor policy consensus. After meeting with George Bush on Taylor's behalf, prominent Republican evangelist Pat Robertson informed Taylor "the only thing I can advise you to do, Mr. President, is appeal to God, because what I'm hearing from George Bush, there's nothing that you can do about what America intends to do."[943]

On 14 August 2000, the UN Security Council requested the UN Secretary General to create a SCSL by negotiating an agreement with the Government of Sierra Leone.[944] Implementation of the strategy to remove Taylor included support for the LURD insurgency and May 2001 sanctions that limited Taylor's fiscal capacity to purchase

939 Interview61, 2009.
940 UN Security Council, *Security Council Resolution 1306 (2000),* 5 July 2000, S/RES/1306.
941 Sierra Leone Web News Archive, July 2000.
942 Eric G. Berman, *Re-Armament in Sierra Leone: One Year After the Lome Peace Agreement,* Small Arms Survey Occasional Paper No. 1, December 2000. UN, *Report of the Panel of Experts*, December 20, 2000, S/2000/1195, para 235.
943 Taylor Transcript, 9 November 2009, 31335.
943 Interview61, 2009.
944 UN Security Council, *Security Council Resolution 1315 (2000)*, 14 August 2000 S/RES/1315.

weapons as well as his access to the armaments marketplace.[945] Taylor hoped France would be able to push through similar sanctions on Guinea for its support of the LURD.[946] However, he had overestimated French influence at the Security Council particularly in opposition to Anglo-American policy.

4.4.2 Narrowing jurisdictional parameters

The US and the UK employed the compliance pull of normative pressure to prosecute crimes to persuade P5 members to allow an internationalized court. The British-constructed narrative informing the Special Court's design was inherent in the empowering resolution that commended the Sierra Leone government and ECOWAS for bringing lasting peace to Sierra Leone.[947] The Security Council resolution made ambitious claims as to the affect a 'Special Court' might have for Sierra Leone. It states that:

"…in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace…" (UN 14 August 2000).[948]

A credible system of justice would end impunity for those who committed crimes during Sierra Leone's civil conflict. But this was not what the Security Council was proposing. Resolution 1314 proposed a tribunal which had, based upon conclusions it had already

945 UN, *Security Council Liberia Diamond Ban and travel Ban come into Force,* Press Release 7 May 2001, SC/7058.

946 International Crisis Group, "Liberia: The key to ending regional instability," Africa Report 43, 24 April 2002.

947 UN Security Council, *Security Council Resolution 1315 (2000)*.

948 Ibid.

made, assumed non-culpability for crimes by the leadership of one party to the conflict. Further, in drafting and negotiating the resolution, permanent Security Council members either assumed non-culpability of their own financial, political or military role in supporting a party to the conflict, or sought to impede investigation of that role through constraining the jurisdiction of the Court or retaining a degree of case selection control.

The identification of the SCSL prosecutor demonstrated the concerns the US shared with Britain and Kabbah about the sovereignty costs of an independent prosecutor who might select cases impinging upon Anglo-American interests. August 2001 saw both the Security Council resolution passed and the US Whitehouse ask Department of Defence lawyer David Crane if he would "help set up an experiment we've got going in West Africa."[949] In September 2001 Crane would begin utilizing Department of Defence intelligence information to formulate who he believed was most responsible for crimes committed during the conflict.[950]

While initial consultations between the UN Secretariat and the Sierra Leonean government were required to ensure a legal mandate for the Court's creation, the key elements of the Court's structure were designed under negotiation between the Attorney General and the Security Council. Once Security Council consensus had been reached on the Court's

[949] David Crane, "The investigation, indictment, and arrest of Charles Taylor: A regional approach to justice," The Baldy Centre for Law and Social Policy, University of Buffalo, February 17, 2010.
[950] Ibid.; David Crane, Former Chief Prosecutor, SCSL, 17 May 2007 and 17 August 2010, via telephone, interview n°22.

creation and financial independence from UN coffers, Britain and the US largely controlled the Security Council position.[951]

After establishing Security Council consensus as to the creation of a 'Special Court', the UN then set about establishing the legal parameters through negotiations with the Sierra Leonean government. Negotiations as to the legal framework and constitutive instruments of the court were held at UN headquarters with Sierra Leonean Attorney General, Solomon Berewa from 12 to 14 September 2000.[952] The UN Assistant Secretary-General for legal affairs then led a team to Freetown from 18 to 20 September 2000 where negotiations were concluded and 'substantive discussions on all aspects of the court' were held with President Kabbah and senior government officials.[953] Meetings suggested a comprehensive public information and education campaign would be required to inform Sierra Leoneans that the number of persons prosecuted would be limited, and that it would not be selective or otherwise discriminatory.[954]

The Security Council, led by the US and the UK, then turned to the Court's mandate and structure. The Secretary General made the first official report in October 2000 on the implementation of the 14th of August Security Council resolution calling for a 'Special Court' for Sierra Leone.[955] Kabbah's government would not delegate jurisdiction until it had confidence that the sovereignty costs could be controlled via functional controls over

[951] Interview61, 2009; Scheffer 2012, 334-9.
[952] UN, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, para 5
[953] Ibid., para 6
[954] Ibid., para 7.
[955] Ibid.

the prosecutor. Indicating the very constrained normative power of prosecuting international crimes, Kabbah's government made clear its reluctance to commit to SCSL cooperation until the court was established and the prosecutor appointed.[956] Kabbah's meager influence over court design, left jurisdictional controls inadequate to exclude he and his government from the prosecution's radar.

The Secretary General's report lays out the disempowered nature of a court without Chapter VII Security Council power suggesting the Security Council may endow the court with Chapter VII powers to enforce State cooperation.[957] The report concurred with the Security Council that the subject matter jurisdiction of the court should include crimes against humanity, war crimes and other serious violations of international humanitarian law.[958] In addressing the Lome amnesty, despite UN approval of Amnesty in the Conakry Accord, the Secretary-General stated that the UN had consistently maintained that 'amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law'.[959] He justified this position by citing the appendage of the reservation to the Lome accord by the UN representative.[960]

The Court's temporal mandate, beginning in November 1996 at the time of the Abidjan peace agreement, was also a limitation on case selection. The Secretary General considered the burden of the prosecution, a date which clearly demarcated a phase in the conflict and

956 Ibid., para 8.
957 Ibid., para 10.
958 Ibid., para 13.
959 Ibid.,para 22.
960 Ibid., para 23.

the inclusion of the most serious period of criminality as instructing the November 1996 date.[961] This date excludes NPRC members from the court's jurisdiction.

In the years within the jurisdiction of the Court (30 November 1996 onward), the Truth and Reconciliation Commission attributed fifty-seven per cent of abuses to the RUF, thirty per cent to the SLA and twelve per cent to the CDF with a negligible percentage committed by ECOMOG forces.[962]

Perhaps most critically, the Secretary General recommends that personal jurisdiction should extend to "those most responsible" including those in "political or military leadership" roles including both a "leadership or authority position" rather than the Security Council's interpretation of "those who bear the greatest responsibility" with reference to 'command authority'.[963] The Secretary General then points out that the practical arrangements such as contributions of personnel, equipment, services and funds are dependent on states not party to the agreement.[964] His initial estimates were that only four personnel were required for the Witnesses and Victims Section (WVS).[965]

The Security Council rejected the Secretary General's proposed jurisdiction of those 'most responsible' stating that it felt the focus of the Court should be 'limited' to "those who played a leadership role" excluding the financiers and political supporters of the various

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961 Ibid., para 25.
962 SL-TRC Report, Vol 2, 2004, 39.
963 UN, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, para 31-2.
964 Ibid., para 55.
965 Ibid., para 57.

armed groups.[966] Political supporters and financiers would have included the UK, which was providing military support to the Kamajors. This issue would not be definitively resolved in terms of the court's mandated jurisdiction. However, the prosecution would follow the Security Council's preference for command responsibility, excluding political or financial supporters from those targeted for prosecution. The Security Council also wished sending states to have primary jurisdiction over peacekeepers and that the Special Court would only have such jurisdiction if the Security Council decided the sending State had not discharged its responsibility.[967]

In January 2001 the Secretary General responded stating its acceptance of the "persons who bear the greatest responsibility" threshold, but stated that it does not limit jurisdiction to political and military leaders only.[968] Instead, he said, determination of the phrase "falls initially to the prosecutor and ultimately to the Special Court itself". He stated that paragraph two of the proposed amendment "those leaders … who have threatened the establishment of and implementation of the peace process in Sierra Leone" is a guide for the prosecutor and not an element of the crime itself.[969] The Secretary General's assertion meant that those that aided and abetted, including Taylor, Compaore, Gaddafi, the UK government, and the Sierra Leonean government, were within the prosecutor's radar. This scenario exaggerated the power to appoint the prosecutor, and the power to influence his or her capacity and access to information.

[966] UN, *Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary*-General, 22 December 2000, S/2000/1234.
[967] Ibid.
[968] UN, *Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, 12 January 2001, S/2001/40.
[969] Ibid.

He then points out that the draft statute put forward by the Security Council places primary jurisdiction over peacekeepers with the sending State but also fails to compel the sending State to hand over such personnel were the sending state to prove unwilling to discharge its responsibility to prosecute.[970] He proposes that the president of the Special Court be capacitated to request the Security Council to require compliance with the Special Court.[971]

4.4.3 Supplementary pressure on SCSL adversaries accompanies the Court's infancy

The anticipated SCSL accused were placed under increasing pressure from sources other than the SCSL. Military, economic, political and legal movements against Taylor forced him to publicly renounce his support for the RUF on 12 January 2001 as well as, ostensibly, expel Sam Bockarie from Liberia although it was not clear where Bockarie was.[972] Conciliatory movements from Taylor were about eight months too late. The June 2000 shift in US policy was unlikely to change twice, particularly with a strategy for Taylor's removal already in motion. In March 2001, having already tried unsuccessfully in January to gain French, Russian and Chinese support, the US imposed UN arms, diamonds and military training sanctions on Liberia as well as travel bans on cited Liberian government members.[973] These were reinforced by legislative initiatives by Judd Gregg to ban the importation of conflict diamonds.[974]

[970] Ibid.
[971] Ibid.
[972] UN, *Ninth report of the Secretary-General on the United Nations Mission in Sierra Leone*, 14 March 2001, S/2001/228, 5.
[973] Interview61, 2009; UN Security Council, *Security Council Resolution 1343*, 7 March 2001.
[974] World Diamond Council Status Report, June 3 2001.

Mounting pressure forced Interim RUF leader, Issa Sesay to finally lay down arms and seriously negotiate. At that time Sesay faced military annihilation due to Guinean attacks, cessation or reduction of Liberian support due to UN sanctions on Liberia, increased UNAMSIL capacity, disarmed RUF combatants fleeing to fight in Liberia, the demonstrated threat of British force deployments to defend Freetown and recurring harrier flights over RUF positions. Sesay accepted Sankoh's non-release, relinquished all RUF areas of control to the government along with full participation in disarmament, demobilization and reintegration, and allowed deployment of UNAMSIL peacekeepers to diamondiferous areas.[975] At this time Sesay cast himself as peacemaker, hoping to avoid Special Court prosecution. He also favored a UNAMSIL presence that deterred Guinean attacks and allowed uninterrupted mining by RUF combatants who were not impeded by UNAMSIL.[976]

Despite the predominance of one party to the conflict (the Kabbah/US/UK alliance) in the Court's design, apparent norm entrepreneurs broadly lauded the court's establishment and avoided questions of politicization. Failure of norm entrepreneurs to communicate deficiencies of independence to negatively affected constituencies lent the Court exaggerated normative power, particularly in the international community.[977] That failing created a pressure on court adversaries in and of itself. The absence of Chapter VII power endowment in the Court agreement was not commonly viewed as indicatory of any international division as to the court's creation, but rather "an agreement between all

[975] SL-TRC Report, Vol 3A, 2004, 461.
[976] Keen 2005, 269.
[977] For example, see: Nsongurua J. Udombana, "Globalization of Justice and the Special Court for Sierra Leone's War Crimes," *Emory International Law Review*, 17 (2003), 55, 80: Schocken 2002.

members of the UN and Sierra Leone."[978] These analyses reinforce the false premise that foreign involvement in the Special Court's creation, design and function were objective broad-based and of utilitarian intent to strengthen the rule of law. The historical role in the region of the international actors who drove the court's creation, design and staffing debunks this premise. The literature has roundly neglected the role of key actors in shaping the court and its processes. Similarly, commentators routinely engage issues relating to court processes, jurisprudence and jurisdiction premised upon utilitarian or moral motivations for the court's creation that emphasize the role of norms and norm entrepreneurs. These analyses are commonly devoid of local and international historical context,[979] facilitating grand claims as to the commitment of the international community to hold perpetrators accountable, no matter how rich, powerful or feared they might be.[980]

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[978] H. Steiner, P. Alston, R. Goodman. *International Human Rights in Context: Law, politics, morals*, 3rd Ed, Oxford: Oxford University Press, 2008, 1239.
[979] T, and M. Wierda, International Centre for Transitional Justice, 2004 *The Special Court for Sierra Leone: The First 18 Months*, 2004; E. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, Yale Law School, March 2005, Yale Law School Student Scholarship Series 6; No Peace Without Justice *Final Narrative Status Report (July 2002 – October 2003),* 2003; T. Perriello and M. Wierda, *The Special Court for Sierra Leone Under Scrutiny,* Report written for the International Centre for Transitional Justice, 2006; C. Schocken, "The Special Court for Sierra Leone: Overview and Recommendations," *Berkeley J. Int'l L* 20 (2002); Beth K. Dougherty, "Right-sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," *International Affairs* 80(2) (2004), 311-328; Lansana Gberie, "Briefing: The Special Court of Sierra Leone," *African Affairs* 102(4) (2003), 637-648; Sigall Horovitz, "Transitional Criminal Justice in Sierra Leone," in N. Roht-Arriaza and J. Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, New York, NY: Cambridge University Press, 2006; Jennifer L. Poole, "Post-Conflict Justice in Sierra Leone," in M. C. Bassiouni (ed.) *Post-Conflict Justice,* Ardsley, NY: Transnational Publishers, 2002; William A. Schabas, "Internationalised Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone," in C. Romano, A. Nollkaemper and J. K. Kleffner (eds.) *Internationalised Criminal Courts and Tribunals, Sierra Leone, East Timor, Kosovo and Cambodia,* Oxford, UK: Oxford University Press, 2004; William A Schabas, "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone," *Human Rights Quarterly* 25(4) (2003),1035-1066; Abdul Tejan-Cole, "The Special Court for Sierra Leone: Conceptual Concerns and Alternatives," *African Human Rights Law Journal* 1(1) (2001), 107-126; Chacha Bhoke, "The trial of Charles Taylor: Conflict prevention, international law and an impunity-free Africa," ISS Paper 127, August 2006.
[980] Chacha Bhoke, *The trial of Charles Taylor: Conflict prevention, international law and an impunity-free Africa*, ISS Paper 127, August 2006.

4.4.4 Key jurisdictional inclusions and exclusions

As the Court began to launch investigations, it is instructive to case selection independence to consider which actors and groups are included and excluded by its jurisdiction. The jurisdiction would enter into force in a remarkably adjusted security environment in Sierra Leone. By 2002, UNAMSIL had taken control of the majority of the country, restoring relative security and initiating de-militarization, de-mobilization, rehabilitation and reintegration of ex-combatants. With the security situation vastly improved, a 16 January 2002 agreement between the UN and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone was signed. Article 2 of the agreement stipulates that the Secretary General and the President of Sierra Leone will appoint key Court personnel.[981] Former court registrars Von Hebel and Vincent cite difficulties for judges as symptomatic of the fact that the majority are not of sufficient competence due to over-politicized UN recruitment causing a lower standard of due process than what both were used to domestically.[982] This situation further empowered the prosecution at the expense of the defence.

With the passing into law of the Special Court Agreement Ratification Act (2002), the SCSL had the legal mandate to begin its work. The ICTY and the ICTR are auxiliary organs of the UN created under Chapter VII authority to address a range of crimes under international law only, including the crime of genocide. However, the SCSL, without Security Council support for UN funding, was instead established by an agreement between the UN and the Government of Sierra Leone. Because of the unique and non-self-

[981] SCSL, *Statute of the Special Court for Sierra Leone*, Freetown, Sierra Leone: 14 August 2000.
[982] Robin Vincent, Former Registrar, SCSL, 19 April 2007, Cheltenham, United Kingdom, interview n°42; Herman Von Hebel, Former Registrar, SCSL, 2 April 2007, Freetown, Sierra Leone, interview n°16.

executing nature of the Court's enabling treaty under international law, the implementation of the agreement required incorporation into the national laws of Sierra Leone.[983]

While the SCSL's design reflected the position of the US and Britain, consultation with the Sierra Leonean government allowed engaged actors, including the President and Vice President, to use cooperative influence to protect themselves, while deploying the Court against a political threat – Sam Hinga Norman.[984]

The courts temporal jurisdiction, beginning 30 November 1996, excludes key actors in command control positions such as the former chairman and head of state under the National Provisional Ruling Council (NPRC), Valentine Strasser. Strasser and other senior NPRC officers had dissidents killed without trial during their time in power. Strasser was provided asylum in Britain for whom extradition would have been embarrassing. This temporal mandate also focused the lens of the prosecution disproportionately on the nature of the conflict during a time when both sides were heavily focused on capturing and retaining mineral rich areas. This lent itself to the adoption of a very superficial understanding of the conflict as a whole and the motivations of the parties involved. The simplified 'blood diamond' narrative neglected the socio-political, economic, ethnic and demographic discontents, but lent itself to a transitional emphasis on 'truth and justice' as the 'correct path' forward.[985]

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[983] Sierra Leone practices dualism, which means that treaties must receive a constitutional and fortiori parliamentary blessing before it can be applied at national level. This occurred with the enactment of the Special Court Agreement, 2002 (Ratification) Act; Udombana 2003, 8.
[984] Interview61, 2009; SCSL Statute; Special Court Agreement, 2002 (Ratification) Act.
[985] US House of Representatives, 2006.

Ad-hoc amnesty is provided to peacekeepers and government aligned private military contractors. Article 1(2) and (3) of The Special Court Statute provided a potential jurisdictional impediment to investigation of personnel higher up the CDF chain of command than Hinga Norman. The Statute places those persons engaged with the government within the primary jurisdiction of their sending State and requires Security Council approval for their investigation by the Court.[986] Some observers believe that Colonel Maxwell Khobie, the ECOMOG commander meets the threshold of "greatest responsibility."[987] Khobie allowed one ECOMOG soldier, known as 'evil spirit', to roam freely in the west of Freetown randomly killing civilians. This article also provides ad-hoc immunity to British private military contractors, British army and British diplomatic personnel who directed, financed and in some instances engaged in hostilities where abuses were committed.[988] The prosecution never seriously considered the culpability of actors above Norman, generally citing an absence of information.[989] Whether or not the article provides immunity to the CDF, as a group engaged by the government, is an argument never raised by the CDF Defence.

Another jurisdictional constraint is the mode of liability for an accused. Taylor's is the most conspicuous case being tried by the Special Court. Taylor is charged with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law in

[986] Article 1(2-3), SCSL Statute; Interview71, 2010.
[987] Alhaji Ibrahim Ben Kargbo, President, Sierra Leone Association of Journalists, 4 April 2007, Freetown, Sierra Leone, interview n°74; Gavin Simpson, Author, SLTRC report, 30 March 2007, Freetown, Sierra Leone, interview n°77.
[988] Legg and Ibbs 1998, 28.
[989] Crane, 2010; Former Office of the Prosecutor, Special Court for Sierra Leone official, 3 April 2007 and 3 February 2013, Freetown, Sierra Leone, interview n°35; Desmond de Silva, Former Deputy and Chief Prosecutor, SCSL-OTP, 16 April 2007, London, United Kingdom, interview n°19.

violation of Articles 2,3 and 4 of the Statute.[990] Taylor, as leader of the NPFL from the late 1980's or as President of the Republic of Liberia from 2 August 1997 until around 11 August 2003, is accused of assisting and encouraging RUF, AFRC/RUF junta and Liberian fighters including ex-NPFL fighters who committed abuses in concert with him, or under his direction, control or subordination.[991] Proving that abuses occurred by the above forces is not a significant obstacle to prosecution since the instances of abuses alleged are the same abuses held by the court to have occurred in the trial of the three RUF accused and the three AFRC accused.[992]

The designing actors appear to have left the mode of liability very wide, allowing the behavior of Taylor to fall within the prosecution's jurisdiction. What the prosecution are required to prove is that Taylor, by his acts or omissions planned, instigated, ordered, committed, or… aided and abetted crimes, or was… involved within a common plan, design or purpose in which it was reasonably foreseeable consequence of such common plan, design or purpose would lead to crimes.[993] In addition or alternatively, the prosecution may show that Taylor, while holding positions of superior responsibility and exercising command and control … knew or had reason to know that a subordinate was

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[990] *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution Second Amended Indictment, 29 May 2007, 1.

[991] Ibid., 1-2.

[992] This can be seen by looking at the dates and places of incidents of alleged crimes in the RUF (excluding the counts relating to Freetown over the period of January and February 1999) and AFRC indictments as well as the RUF and AFRC judgments that reflect those in the Taylor indictment. *Prosecutor v Sesay*, *Kallon and Gbao*, SCSL-04-15-A, Appeals Chamber, Judgement, 26 October 2009; *Prosecutor v Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Amended Indictment, 2 August 2006; P*rosecutor v Brima, Kamara and Kanu*, SCSL-2004-16-PT, Amended Indictment, 18 February 2005; *Prosecutor v Brima, Kamara and Kanu*, SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008; *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution Second Amended Indictment, 29 May 2007, 9,.

[993] *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Prosecution Second Amended Indictment, 29 May 2007.

about to commit such acts or had done so, and Taylor failed to take necessary and reasonable measures to prevent or punish.[994]

The trial chamber found that Charles Taylor was culpable only for aiding and abetting all crimes in the indictment and of planning only the episode of RUF/AFRC criminality between December 1998 and February 1999.[995] He was found to have only substantial influence over the RUF/AFRC, not to bear individual criminal responsibility and not to hold effective control over the leadership of the RUF or AFRC.[996] This judgment indicates that Taylor did not fall within the prosecution's apparent command responsibility criteria preferred by the Security Council, but still within the criteria of financial supporter, a criteria supported by the UN Secretary General.

The court's structure and mandate set parameters restraining the prosecutor's jurisdiction to those bearing the greatest responsibility for crimes committed, other than external private military and peacekeeping personnel that supported the preferred party to the conflict. Functional and fiscal elements, some of which were built into the court's design, further impeded pursuit of persons within these parameters.

4.5 Cooperative Methods of shaping SCSL case selection

The Court quickly developed the symptoms of an institution designed by actors with an interest in selective justice. Thierry Cruvellier and Marieke Wierda, for example, found in their analysis of the Special Court's first eighteen months, that the OTP had developed

[994] Ibid.
[995] *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Judgment, 18 May 2012.
[996] Ibid., 2466-8.

much faster and with greater resources than the defence.[997] This phenomenon was one of many symptoms of a court functioning within intangible political and tangible jurisdictional parameters. The looming threat of inadequate voluntary donations from donor states, due to the absence of Chapter VII status,[998] has brought the court close to ceasing operations on occasion. The UN Secretary-General warned against such a funding mechanism in 2001, fearing it might make the court unsustainable.[999] The first concerning symptom of this structural difficulty is the disproportionate funding of the prosecution as opposed to the defence. Limited resources, in conjunction with a limited timeframe for trials to be conducted, disadvantage the defence and further skew processes in favor of the prosecution and the interests of those responsible for the Court's design.[1000] The registry, the prosecution and the chambers are all organs of the Court and are able to lobby for funding individually, yet the defence must rely upon the registry to lobby for and disseminate funding to it.[1001] Consequently it was not until the Court's second year that a defence office was incorporated into the budget.[1002] It is commonly found that the main states funding the Court (the US and Britain) are more enthusiastic about funding the prosecution than the defence.[1003]

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[997] Cruvellier and Weirda 2004,1-3.
[998] UN, *Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, 12 January 2001, S/2001/40.
[999] Ibid.
[1000] Peter Tucker, Sierra Leone Law Reform Commissioner, 5 April 2007, Freetown, Sierra Leone, interview n°65; Olayinka Creighton-Randall, Former Director, Campaign for Good Governance, 3 April 2007, Freetown, Sierra Leone, interview n°30; Simpson, 2007; Ben Kargbo 2007.
[1001] Vincent Nmehielle, Former Principal Defender, SCSL, 2 April 2007, Freetown, Sierra Leone, interview n°84.
[1002] Interview42, 2007.
[1003] Ibid.; von Hebel, 2007.

Because they were empowered to fund the Court, the British and US governments were also empowered to recommend critical Court appointments to the Secretary General and to withhold funding as and when court functions occurred or threatened to occur outside expectation.[1004] The US recommended as the court's first Chief Prosecutor, a lawyer from the Department of Defence named David Crane. The Secretary General did not view Crane's curriculum vitae favourably, requiring Secretary of State, Colin Powell and others to call and persuade him.[1005] The Government of Sierra Leone appointed the deputy prosecutor, Desmond De Silva. President Kabbah and Mr. de Silva were former colleagues of the same chambers in London.[1006] The US was also able to appoint a number of key prosecution personnel.[1007] Apart from wielding discretion to select personnel, the designing powers further shaped case selection by providing information that shaped the direction of investigations.

Prosecution personnel, empowered to target 'those who bear the greatest responsibility' bore the hallmarks of British and US interests. The original prosecutor, David Crane admits, available intelligence at the Department of Defence (DOD) was critically instructive in formulating whom to target. Since being informed he was likely to be appointed as prosecutor in September 2001, he had had almost a year to examine DOD information. He also stated that after seeking NGO corroboration of DOD information he held "a four corners idea as to who bore the greatest responsibility" before going to Sierra

[1004] Interview42, 2007.
[1005] Rostow, 2012.
[1006] UK Parliament, Select Committee on Standards and Privileges, minutes of evidence, 19 July 2005.
[1007] Rostow, 2012.

Leone to begin investigations.[1008] A former prosecution investigator noted that upon the arrival of the prosecutor in Sierra Leone, it was already clear which persons were going to be investigated.[1009]

David Crane viewed the conflict as beginning because of individual criminal gain.[1010] He viewed his case against the RUF as the 'blood diamond story' – 'the movie for real' in which the motives for the RUF insurgency "all boiled down to a commodity, generally diamonds" and the personal criminal gain of the RUF leadership.[1011] He also viewed the conflict as 'a good news story' because 'the good guys [Kabbah and the British Government] won'. Once in Sierra Leone, the prosecution was also contacted by the British intelligence service (MI6).[1012] Meetings with MI6 were held in London as well as other locations in Europe, Sierra Leone and West Africa, with information provided that reinforced planning as to abuses and persons to be prosecuted.[1013] British and American intelligence officers were sharing intelligence on RUF procurement of financial, military and logistical support that was passed to the prosecution.[1014]

Upon arrival in Sierra Leone, the prosecutor decided to hasten the recruitment process to 'build the office around the mission', rather than 'the mission around the office'.[1015] President Kabbah had directed the British provided Inspector-General of police, Keith

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[1008] Crane, 2010.
[1009] Interview71, 2010.
[1010] Crane, 2010.
[1011] Ibid.; US House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Prosecuting the use of children in times of conflict*, Testimony of David Crane, 8 April 2008.
[1012] Crane, 2010.
[1013] Ibid.
[1014] Taylor Transcript, 9 November 2009, 31446.
[1015] Crane, 2010.

Biddle, to cooperate with the Special Court office of the prosecutor where required. Both the British and Kabbah, had an interest in shaping CDF case selection so as to prevent Kabbah's indictment or pursuit of elements within the British government. The Inspector General of police seconded Sierra Leonean investigators to the prosecution. After a month to 45 days in Sierra Leone, who, what, when, where was clear to the prosecution and indictment drafting began.[1016] The seconded Sierra Leonean police officers led investigations, including investigations of the CDF.

Every major appointing authority, and as a consequence key prosecution appointees, excluding the HRW seconded adviser, had a historical or institutional conflict of interest stemming from professional experience aligned to a party to the conflict. The effect of these professional allegiances on case selection was exaggerated by reliance on information from institutions with similar allegiances, as well as functional impediments. A senior Registry member cites political pressure on then chief prosecutor David Crane not to indict Gaddafi, despite his culpability, due to the appearance of a Gaddafi indictment by a US funded tribunal.[1017] A senior SCSL-OTP member admits he "found Gaddafi to bear the greatest responsibility" but viewed his indictment as too politically sensitive.[1018]

The court's dependence on voluntary contributions from the US and Britain was also critically instructive in shaping case selection. Explaining his non-indictment as "a political decision," Crane stated, "If I had indicted Gaddafi and Compaore then we would have been shut down", indicating the pressure applied by both the State Department and

[1016] Ibid.
[1017] Nmehielle, 2007.
[1018] Crane, 2010.

Congress.[1019] In November 2002 a decision was therefore taken to pursue only one of the three leaders allegedly involved in the RUF joint criminal enterprise.[1020] Muammar Gaddafi, Blaise Compaore of Burkina Faso and Charles Taylor were also considered to be amongst those most responsible for RUF aligned AFRC crimes. Compaore and the weapons trader, Ibrahim Bah, who organized the facilitation of arms through Burkina Faso to the RUF, were originally thought to be within the political parameters of indictment.[1021] Their cooperation with the US government on terrorism (Bah was on the payroll of US intelligence), as well as the anticipated political and diplomatic fallout of indicting more than one head of state outweighed the good of holding the two accountable.[1022]

The leader that the prosecution decided to pursue was Charles Taylor, whom the US government was actively attempting to remove from office by funding an insurgency, implementing sanctions and actively inducing anti-Taylor sentiment. Senator Judd Gregg was now publicly calling for Taylor's government to be overthrown.[1023] Fermenting anti-Taylor sentiment included US Agency for International Development (USAID) funding opposition construction of toilets and clinics in areas with strong support for Taylor's government and the recruitment of government officials, student leaders, parents-teachers associations, traditional leaders, ex-combatants and sex workers to form coalitions to effect

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[1019] Crane, 2007; Crane, 2010; Michael Miklaucic, Former Deputy Ambassador at Large for War Crimes Issues, US Department of State, 20 September 2011, via telephone, interview n°54; Interview with former staffer to Senator Judd Gregg, 12 July 2012, Washington D.C. interview n°82; Chief Prosecutor, David Crane also stated this in an interview with The Times newspaper: "Prosecutor reveals how Britain let Gaddafi off," *The Times* (London, England), 25 February 2011.
[1020] Crane, 2010.
[1021] Interview71, 2010.
[1022] Ibid.; According to intelligence reports, Bah had been given $10,000 by US officials who also bought him a plane ticket to Abidjan where he spoke to US officials in January 2002 as well as in Ouagadougou in February. See: Taylor Transcript, 9 November 2009, 31451-3.
[1023] Taylor Transcript, 9 November 2009, 31354.

social and political change.[1024] The impending November 2003 elections in Liberia placed the US government under pressure to remove Taylor before the ballot.[1025]

Regional cooperation in an attempt to pursue an African leader was obstructed. The Special Court immediately encountered Nigerian interference. The Special Representative to the Secretary General and subsequently the Nigerian Foreign Minister, Oluyemi Adeniji, blocked UN cooperation with the court, undermining its initial ability to secure offices and equipment.[1026] In February 2003, in an effort to protect anticipated RUF accused, then Prosecutor David Crane alleges that Adeniji attempted to have Issa Sessay and Morris Kallon secretly removed to Nigeria on agricultural scholarships.[1027] Crane informed the bearer of the news, Deputy Special Representative to the UN, Alan Doss, that he would prosecute Adeniji for obstruction of justice, were this to happen.[1028]

The messianic demeanor of the prosecution did not necessarily endear it to African leaders. On 3 March as he signed the indictments for the thirteen accused Chief Prosecutor David Crane told his gathered staff "the ghosts of a hundred thousand Sierra Leoneans are in this room right now."[1029] On 10 March 2003 the prosecution, through the Sierra Leone police, sought to arrest the thirteen persons except for Charles Taylor, whose indictment was sealed due to political considerations and the perceived fear that he may intimidate or eliminate witnesses.[1030] According to the Chief Prosecutor; "The people of Sierra Leone

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[1024] Linskey, 2010; Taylor Transcript, 9 November 2009, 31356-7.
[1025] Linskey, 2010; Taylor Transcript, 9 November 2009, 31357.
[1026] Crane, 2010; Crane, 2007; Interview42, 2007.
[1027] Crane, 2006; Crane, 2010.
[1028] Ibid.
[1029] Crane 2010.
[1030] Crane, 2010; Crane, 2006.

began to believe that no one was above the law", it was a "new Sierra Leone"… "a special moment for them".[1031] AFRC leader, Johnny Paul Koroma and RUF deputy leader, Sam Bockarie were able to avoid arrest. Bockarie was by this time in Liberia. However, Johnny Paul Koroma had been allowed to escape arrest and trial for alleged treason by police. He had remained on the run.[1032] His current whereabouts remain unknown.

4.5.1 Investigative cooperation and adherence to the initial list

The original list of potential accused was larger than the final number prosecuted. It did include Blaise Compaore but on the side of the CDF, Hinga Norman was as high as the chain of command went.[1033] Some Court observers have cited the prosecution of the CDF accused as demonstrative of the Sierra Leonean government's willingness to allow impartial investigation. However the relationship between Hinga Norman and President Kabbah was one of deep mistrust.[1034] Many observers believed Norman sought to usurp Kabbah as leader of the Sierra Leone People's Party and that Kabbah and those close to him, particularly Solomon Berewa, viewed Norman as a political threat.[1035]

From the time of the prosecution's arrival in October 2002 there was no suggestion of investigating anyone in the CDF chain of command higher than Hinga Norman. One list of those allegedly implicated in crimes was provided by British seconded police officer Keith Biddle.[1036] Some elements of the prosecution provided leads for investigation of the

[1031] Crane, 2006.
[1032] Sierra Leone Web News, March 2003.
[1033] Interview71, 2010.
[1034] SL-TRC Report, Vol 3A, 2004,
[1035] Interviews65, 2007; Creighton-Randall, 2007.
[1036] Interview71, 2010.

political and military supporters of the CDF. Those sources did not believe the information was thoroughly pursued.[1037]

The first apparent impediment to pursuit of this line of inquiry appeared to be the dependency upon local cooperation with security forces. The consciousness that the investigation and prosecution depended on Sierra Leonean State cooperation was an element prosecution personnel were aware of.[1038] Attempts to vigorously pursue incriminating information relating to President Kabbah, other senior elements of the SLPP or elements of, or partners with the British government, may have caused a cessation of cooperation as experienced at the ICTR. The removal of Del Ponte from the ICTR was fresh in the minds of the prosecution.[1039]

However, David Crane insists, there was no evidence available to the prosecution implicating either Kabbah, or Berewa, who the prosecution perceived to be potentially more culpable than Kabbah.[1040] To what extent, British, American or Sierra Leonean intelligence would or did make such information available, is unclear. Indeed some elements within the prosecution believed at least one of the seconded investigators were providing information on the direction of CDF investigations to Solomon Berewa.[1041] Evidence of Kabbah's role in aiding and abetting, and quite possibly wielding command

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[1037] Ibid.
[1038] Former Member, OTP at the SCSL, 23 July 2010, via telephone, interview n°86.
[1039] Ibid.
[1040] Crane, 2010.
[1041] Interview71, 2010.

control over the CDF, was easily obtained by the SL-TRC.[1042] The SL-TRC, with comparatively meager investigative capacity, found and documented instances in that Kabbah's government was:

"aware of human rights violations and abuses carried out by the CDF, through the role of its Deputy Defence Minister, Chief Sam Hinga Norman, who served as CDF National Coordinator, and through members of the CDF War Council at Base Zero. The Government was further kept informed through its Security Committee briefings and through reports received from ECOMOG. Nevertheless the Government failed to take steps to stop such violations and abuses. The Commission, accordingly, holds the Government responsible for the violations and abuses of human rights committed by the CDF."[1043]

The report cites then Attorney General, Solomon Berewa as particularly culpable for arbitrary exercise of the death penalty and cites Kabbah as culpable in his capacity as Commander in Chief of Pro-Government Forces including the CDF.[1044] It certainly appears that Kabbah warranted far greater attention from an objective investigation into his role in the alleged criminal conspiracy "to use any means necessary to defeat the RUF/AFRC forces to gain control over the territory of Sierra Leone."[1045]

[1042] President Kabbah flew to the CDF base zero on the Island with supplies for the CDF when he was organizing support before and after Operation Black December in 1997 and received information from Daramy-Rogers from Norman regarding CDF conduct. See SL-TRC Report, Vol 2, 2004,238, 285-6, 273

[1043] SL-TRC Report, Vol 2, 2004, 68.

[1044] Ibid., 70-1, 80.

[1045] *Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-03-14-I, Indictment, 4 February 2004.

Further evidence of British aiding and abetting of the CDF, in violation of UN sanctions is publicly available in the British Parliamentary inquiry by Sir Thomas Legg KCB QC and Sir Robin Ibbs KBE.[1046] Despite evidence of criminal conduct, the UK Attorney General decided that no criminal proceedings should follow their investigation "because, although offences might have been committed, any prosecution might well fail and in any event would not be in the public interest."[1047] The Sierra Leonean State's intent not to cooperate, where hostile Court action against government figures was apparent, is evident in Attorney General Carew's response to Justice Boutet's enquiry as to Sierra Leonean government intent to cooperate with a Court-issued subpoena of President Kabbah to testify as a witness:

"as long as His Excellency the President has not been indicted or has not committed any offence, internationally or otherwise, I cannot see myself as Attorney General to order his arrest and put him in - order his arrest and request the police to put him in custody. This is why I said, My Lord, there are certain things the Court will refrain because they do not want to diminish their image and their authority. We are not saying that you don't have the power, My Lord. It was the question of the practical enforcement of that order."[1048]

The Attorney General had previously stated, the Court would, or should, not act in vain to subpoena the President because the non-enforcement of the subpoena by the Sierra

[1046] *Legg* and *Ibbs* 1998.
[1047] Ibid.
[1048] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Transcript, 14 February 2006.

Leonean government would diminish its authority.[1049] The Court ate humble pie and refused to subpoena President Kabbah.[1050]

In his concurring but separate opinion Justice Itoe indicated his subjugation to the impunity exercised by the President. He claimed a subpoena of the President should not be issued where "its issuance will put the interests of peace, law and order and the stability of the Country and of its institutions at peril or in jeopardy, and threats which are disruptive of this process".[1051] Justice Itoe further claimed that the President enjoyed immunity from subpoena under the Sierra Leonean constitution[1052] and that his position as one of 'the princes who govern us', requires: "an environment, an atmosphere, and an institutional framework for them to perform their duties in all tranquility and without any unnecessary interferences which could result from the issuance of a Subpoena."[1053]

4.5.2 Bringing Taylor before the Court

The capacity of the US to bring Charles Taylor before the SCSL, demonstrates the extent to which it did not require the enhanced 'obligation' of a Chapter VII mandate. In April 2003, when the Taylor indictment was still sealed, the prosecutor leaked copies to the US Assistant Secretary of State for Africa, Walter Kansteiner, the US Ambassador to Sierra

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[1049] Ibid. 74.

[1050] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, (Justice Thompson dissenting); *Prosecutor v Norman, Fofana and Kondewa*, SCSL-2004-14-T, Appeals Chamber, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, 11 September 2006 (Justice Robertson dissenting).

[1051] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006.

[1052] Ibid.

[1053] Ibid.

Leone, Peter Chaveas, and to the US Ambassador at Large for War Crimes Issues.[1054] On 4 June 2003, when Taylor was engaged in peace talks in Accra, Ghana, the prosecution, with intent to 'humble and humiliate (Taylor) before his peers, the leaders of Africa', unsealed Taylor's indictment.[1055] The Ghanaian officials quickly returned Taylor to the airport and he returned to Liberia. Ghana's behavior, despite breaching international legal obligations,[1056] was entirely predictable. The then US government was also not pleased with the timing of the unsealing of the indictment for the Liberian peace process and Liberian security.[1057]

Other elements of US policy at the time, including the tacit support of the LURD rebels, as well as UN sanctions, were weakening Taylor's hold on power. The prosecutor's office had been in daily contact with the LURD, advising them not to attack Monrovia prior to the release of the indictment of Taylor.[1058] Several weeks later, famously exclaiming "god willing, I'll be back", Taylor boarded a plane to Nigeria upon the agreement he would not be harassed for extradition or be tried by any domestic court in Liberia or Sierra Leone or any international criminal tribunal including the Special Court.[1059] President Obasanjo allegedly assured him this was the position of both the AU and ECOWAS.[1060]

[1054] Crane, 2006.
[1055] Ibid.
[1056] Amnesty International, "Special Court for Sierra Leone: Amnesty International calls on the government of Ghana to arrest President Charles Taylor," 4 June 2003.
[1057] Crane, 2007.
[1058] Interview86, 2010.
[1059] Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun*, 8 August 2010.
[1060] Taylor Transcript, 10 November 2009, 31508-9.

Taylor allegedly continued to try to manipulate the security and political situation in Liberia from afar and attempted to have Guinean President Lansana Conte assassinated.[1061] Conteh had supported the LURD rebellion from Guinea against Taylor. The prosecution continued to lobby the US government for support on the Charles Taylor issue. The Bush administration proved initially reluctant to support a Nigerian hand over of Taylor to the court. Senator Gregg continued to lobby the Whitehouse.[1062] In May 2005, the Bush Administration appeared to have altered its policy when President Obasanjo of Nigeria stated, after meeting then President Bush, that "a democratically elected government in Liberia should handle Taylor's case".[1063] On 5 October 2005, the United States House of Representatives passed resolution 127 calling on Nigeria to transfer Taylor to the Special Court.[1064] The Nigerian government maintained that it would only hand over Taylor to a Liberian government considering that the Liberian President would never make such a request.[1065]

On 8 February 2006 the US House of Representatives Committee on Foreign Relations considered the impact of Liberia's election of Ellen Johnson Sirleaf and the hand over of Charles Taylor to the Special Court ahead of an impending visit from the Liberian president. Taylor's former advocate, Donald Payne suggested:

1061 BBC News, "Taylor 'behind Guinea coup plot'," *BBC News*, 3 May 2005; Crane 2010.
1062 Interview44, 2010.
1063 Josephine Lohor, "Obasanjo Wants Elected Govt to Handle Taylor's Case," *This Day*, 17 May 2005.
1064 109th Congress Resolution 127 (2005-2006), *Calling on the Government of the Federal Republic of Nigeria to transfer Charles Ghankay Taylor, former President of the Republic of Liberia, to the Special Court for Sierra Leone to be tried for war crimes, crimes against humanity, and other serious violations of international humanitarian law*, (H.CON.RES.127), 5 October 2005.
1065 Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun,* 8 August 2010.

"I think that we need to stabilize Liberia and give the President an opportunity to start her process moving forward without having the tremendous distraction of focusing solely on Taylor, and other things will certainly fall by the wayside. I think we need to keep the Taylor issue very much in front of us. However, I would hope that we do not get distracted and do give the total support she needs to try to move that country on the road to recovery."[1066]

Payne's preference for delaying pressure upon President Johnson-Sirleaf, even for three to six months,[1067] appeared impotent in the face of letters from congressional prosecution allies to the Bush administration stating that, "any future aid to Liberia be tied to a hand-over of Charles Taylor."[1068] When President Johnson-Sirleaf subsequently visited the US in February 2006, key members of the US Senate appropriations committee told Johnson-Sirleaf that if she wanted US aid totaling $55 million, she had to formally request President Obasanjo to "turn Charles Taylor over".[1069]

On 27 March 2006, two days before Presidents Bush and Obasanjo are due to meet in Washington, the US government stated it was Nigeria's responsibility to hand Taylor over. Hours later, Taylor went missing from his Nigerian lodgings.[1070] On 28 March President Obasanjo, already in Washington, was informed the meeting was conditional on his securing Charles Taylor and sending him to the Special Court.[1071] Taylor was arrested two

[1066] US House of Representatives, 2006.
[1067] Ibid., 109.
[1068] Ibid., 80.
[1069] Crane 2010; Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun,* 8 August 2010.
[1070] IRIN, "Outcry as Taylor goes missing," 28 March 2006; Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun,* 8 August 2010.
[1071] Crane 2010; Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun,* 8 August 2010.

hours later by Nigerian special operations forces that had been escorting him to the Cameroonian border.[1072] Taylor allegedly had a battalion-sized army awaiting his return in Lofa County in Liberia.[1073] As they met, Obasanjo informed President Bush Taylor was landing in Liberia en route to the SCSL.[1074] Taylor's trial was subsequently moved to temporary Special Court premises made available at the ICC in The Hague due to security concerns.[1075] The transfer was made possible via instruction through a Security Council resolution, the first time Chapter VII powers had been utilized in such a manner.[1076]

4.5.3 Witness testimony: The key to case selection implementation

Due to the nature of both the conflict and the under-development of the Sierra Leonean and Liberian States, a dearth of documentary or forensic evidence is available to prosecution and defence investigators. Both parties are therefore disproportionately dependent upon witness testimony to prove or disprove the alleged cases.

The design of the court provided greater protective power to the prosecution than the defence, significantly harming the rights of the accused. It also provided discretion to the designing powers to finance both prosecution and defence investigative capacity. These two methods of shaping case selection were employed to provide prosecution investigators disproportionate finance to provide protection to witnesses and discretion to decide upon protective measures.

1072 Crane 2010; Femi Fani-Kayode, "Charles Taylor: A man betrayed," *Sun,* 8 August 2010.
1073 Crane 2010.
1074 America.gov, "Bush welcomes Nigeria's Capture of Charles Taylor, Discusses Sudan, energy, economic development with President Obasanjo," 29 March 2006.
1075 UN Security Council, *Security Council Resolution 1688*, 16 June 2006, S/RES/1688.
1076 Ibid.

The WVS of the SCSL is often cited as a new international criminal justice model for protecting African witnesses. Its role of 'supporting and protecting'[1077] witnesses indicates the widening interpretation of witness protection to facilitate greater material benefit for witness cooperation. Established under Article 16(4), the WVS has taken great strides in psycho-social support as well as the refining of normative protective modalities to reflect witness psycho-social needs.[1078] The WVS is guided by the rules of procedure and evidence adapted from the ICTR under article 14 of the Statute and section 10 of the Special Court Agreement Ratification Act.[1079]

The court's narrow mandate to prosecutte only those that played a leadership role[1080] drives the heightened importance of insider witnesses for establishing or contesting the chain of command and the knowledge and orders of accused. The increased importance of witness testimony and the increased prosecution capacity provided by court donors meant that while twenty-five and seventy-five per cent of witnesses at the ICTY and ICTR respectively were provided protection, ninety-five per cent of SCSL witnesses are provided some form of protection.[1081] The credibility of a key witness in the Charles Taylor trial, TF1-371, who provided testimony critical to Taylor's conviction for 'planning' the use of

[1077] Rebecca Horn, Saleem Vahidy, Simon Charters, *Best practice recommendations for the protection and support of witnesses: An evaluation of the Witness and Victims Section*, Special Court for Sierra Leone, 2008, 1.
[1078] The author was employed at the SCSL in 2008 where he worked closely with the WVS.
[1079] SCSL Statute 2000; Special Court Agreement, 2002 (Ratification) Act.
[1080] Those who played a leadership role: UN, *Letter dated 22 December 2000 from the president of the Security Council addressed to the Secretary-General*, 22 December 2000, S/2000/1234.
[1081] Saleem Vahidy, Chief WVS, SCSL, 28 March 2007, Freetown, Sierra Leone, interview n°12.

'all means' for the 1999 Freetown invasion, was challenged by the defence after inconsistencies in a prior statement.[1082]

The WVS interprets its protective mandate as 'protection physically, psychologically and financially'.[1083] Officially undertaking to protect the financial security of witnesses represents a departure from protective practice and indicates the finance available to witness protection at the Special Court. With all cases before the Court concluded, and with one accused (Johnny Paul Koroma) still at large, there has yet to be an incident of serious consequence for a witness's security. The decisive nature of the military victory by the British-backed Kabbah government dramatically constrained the capacity of those with an interest in threatening witnesses to carry out any threat.

There has however, been multiple instances of questionable provision of material benefit to cooperating witnesses and use of protection to prevent access to defence counsel. The rules of evidence and procedure empower the prosecution to 'take all measures deemed necessary for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources'.[1084] This discretion led to the establishment of a prosecution witness management unit with power to provide protection and material support similar to that provided to WVS. The Prosecution program created a confused protective mandate. A conflict of

[1082] *Prosecutor v Charles Taylor*, SCSL-03-01-PT, Judgment, 18 May 2012.
[1083] SCSL, *Rules of procedure and evidence of the Special Court for Sierra Leone*, 27 May 2008, (most recently amended).
[1084] Rule 39(ii), SCSL, *Rules of procedure and evidence of the Special Court for Sierra Leone*, 7 March 2003 (27 May 2008 most recently amended).

interest arises between investigators' intent to procure particular evidence, and their discretion to provide a source of income to informers and potential sources.

The court is empowered to order appropriate measures to safeguard the 'privacy and security' of victims and witnesses while considering the rights of the accused.[1085] However, no consideration of accused rights or reference to the WVS as an independent arbiter of contentious provision to witnesses is made by rules empowering prosecution protective practice.[1086] Consideration of witness privacy, as opposed to security, elevates witness psychological well-being and also weighs witness privacy far too heavily against accused rights. Disproportionate weighting of witness psychological security over accused rights also indicates political intent to secure prosecutions of politically expedient cases, at the expense of court independence.

The rules also allow for admission of written statements from persons that have subsequently died or who are unable to testify.[1087] However, the rules provide that if written evidence goes to the proof of acts and conduct of the alleged offence, a judge 'may' rule against admitting the evidence.[1088] At the judge's discretion, the incentive to kill or intimidate witnesses may be significantly lowered by admitting written evidence and removing the need for the witness themselves. However, for actors wishing to artificially reinforce amenable case selection, admission of written statements that can not be cross-examined provides those actors one more manipulative instrument.

[1085] Ibid., Rule 65, 75.
[1086] Ibid., Rule 39(ii).
[1087] Ibid., Rule 92 quarter (A).
[1088] Ibid., Rule 92 quarter (B).

While the SCSL Statute legally situates the WVS under the registry,[1089] it is physically located in the electronically controlled security division of the court in which only prosecution and WVS personnel are allowed. In this division the WVS shares offices on the same corridor as the prosecution's witness management unit and investigators, separated by a security fence from the defence and registry.

Questionable practices within the prosecution investigation have been observed. In observing the CDF trials Kelsall notes "strenuous efforts were made to re-interview and proof witnesses to ensure their stories placed the accused in the responsibility frame".[1090] Practice of this nature is indicative of an investigation directed at incriminating and prosecuting particular individuals rather than particular crimes.

The prosecution is required to make critical interpretations about 'those who bear the greatest responsibility', but also to solicit witness cooperation from their former colleagues and immediate subordinates. Insider witnesses were required to help the prosecution establish chain of command, orders to commit abuses, or knowledge of abuses without action to stop or discipline them. A decision not to prosecute those without 'a national leadership role' was taken, assisting the solicitation of witness cooperation from accused former subordinates.

[1089] SCSL-Statute, article 16(4).
[1090] Tim Kelsall. *Culture under cross-examination: International justice and the Special Court for Sierra Leone.* Cambridge: Cambridge University Press, 2009, 219; Interview71, 2010.

Some witnesses in the Charles Taylor case were initially reluctant to incriminate themselves until the prosecution's mandate and policy had been clearly explained. The narrow mandate of the SCSL has made soliciting insider testimony more feasible by lowering the suspicion of informants and insider witnesses about the likelihood that they, too, would be prosecuted. As a consequence, investigators were able to avoid a policy of strategically moving up the command chain. Such an investigative process is far more costly and time-consuming. It imposes additional hurdles, including the difficulty of obtaining a plea bargain that judges would accept, and cooperation from States on asylum for witnesses who have gained plea bargains. The prosecution was able to tell insider witnesses, 'You are below our radar screen,' and to provide them with letters stating, 'We have reviewed this matter and will not prosecute you.' Providing this discretion to prosecutors increases the chance of successful prosecution for States seeking to reinforce favorable case selection. The prosecution at the SCSL was able to reinforce its enhanced witness cooperation capacity in the Charles Taylor case by pursuing Taylor under 'Joint criminal enterprise' (JCE). JCE means those "participating in the commission of crime, where several persons with common purpose, embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. [It] requires only joint intent and requires all conspirators to be accountable for each other's criminal acts."[1091]

The line becomes blurred when practice does not make clear if an informant is, or is not, a suspect. The prosecution contends that inducement of RUF field commander Issa Sessay to provide information on senior RUF colleagues took the form of assurances that he and his

[1091] ICTY, *Prosecutor v. Dusko Tadic*, Judgment, Appeals Chamber, IT-94-1-A, 15 July 1999, para 190–191.

family would be kept safe from other indictees, not to provide him with immunity. The following statement by former prosecutor David Crane illuminates the confusing and unregulated manner and techniques employed:

"Techniques – investigative techniques and intelligence techniques — that were followed by our office, that didn't have to be written down. It's part of the way things are done… I called it dancing with the devil."[1092]

The engagement of Mr. Sesay is one of isolation from legal counsel, confusion as to witness or suspect status, and exploitation in a time of political flux. Investigators told Mr. Sesay that if he did not confirm things, investigators would not be able to help him out with 'his problem'.[1093] In the days following Mr. Sesay's arrest he was held in Court custody without access to counsel, offered the prospect of an insider deal without fully understanding the charges against him, and subjected to various forms of pressure and inducement.[1094] The pressures included the tacit threat not to assist in the protection of Mr. Sesay's family, as well as the potential inducement of a perceived possibility that charges might be dropped or at least downgraded. The Court ruled inadmissible more than a thousand pages of testimony taken while Mr. Sesay was in custody.[1095] Whether the 'problem' constituted Mr. Sesay's potential prosecution or the safety of his family is contested. The use of inducement to provide evidence in exchange for assistance on either

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[1092] Penelope van Tuyl, *Effective, efficient and fair? An inquiry into the investigative practices of the office of the prosecutor at the Special Court for Sierra Leone*, War Crimes Studies Centre, University of California Berkeley, September 2008, i.

[1093] Ibid.

[1094] Ibid.

[1095] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Decision on the admissibility of certain prior statements of the accused given to the prosecution, Trial Chamber I, SCSL-04-15-T-1188, 30 June 2008; Van Tuyl 2008, 3.

interpretation of ‘the problem’ illuminates serious malpractice within the prosecutor’s office.

Those working in the WVS experienced the symptoms of perceived inducement as a means to solicit testimony. It commonly facilitated reluctance on the part of witnesses to testify because they had not been provided the ‘daily allowance’ amounts that investigators had promised them. The defence also alleged prosecution duplication of rent provisions after witnesses had been handed over to the WVS, exaggerated petrol and travel payments, and unnecessary security provisions, such as a fence around a witness’s orchard.

Placing the interpretation of ‘potential’ witnesses at the discretion of the prosecution enables it to provide protective measures up until testimony. More importantly, it also allows it to make its own judgment about the threat and the consequent level of assistance. This facilitates high prosecution threat interpretations and therefore greater material provision to the witness to encourage them to testify against an accused. The prosecution’s conflict of interest undermines its objectivity in assessing risk and deciding upon protective measures. The conflict of interest was exaggerated by the provision of more money to the SCSL than the US government had budgeted for.[1096] The occasions in which this has come to the Court’s attention represent only a number of those cases where the prosecution has decided to use witnesses. Personnel interviewed from the prosecution cite the provision of material benefit to witnesses by the original head of investigations, Al White, as being so extravagant that the prosecution no longer felt comfortable using the

[1096] Linskey, 2010.

witnesses.[1097] That the prosecution itself was willing to exclude witnesses based on unwarranted material provision in some instances is to some extent reassuring. However, it does not mitigate the fact the practices occurred, undermining the integrity of witness evidence.

The Court itself refused to take these issues seriously. A motion to hear evidence concerning payment to witnesses by the prosecution's witness management unit was declined by the court on the basis that no 'material prejudice' had been caused to objecting parties, and that the motion had not been raised at the earliest opportunity.[1098] The submission related to witness payments made by the prosecution for items or services ranging from medical supplies to 'maintenance', 'information', 'time wasted', school fees and rent, some of which had been unnecessarily duplicated.[1099] The prosecution in its response cited rule 39(ii) as providing an 'unfettered discretion' to 'take all measures necessary for the purpose of the investigation'.[1100] It conflated its mandate with that of the WVS in citing the trauma witnesses experienced in coming to trial as prohibitive, were they to also suffer financially.[1101]

One incidence of questionable practice has come under particular scrutiny. It relates to a critical insider witness in the RUF case. The witness was repeatedly afforded fully funded

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[1097] Interview71, 2010.
[1098] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Decision on Sesay motion to request the Trial Chamber to hear evidence concerning the prosecutor's witness management unit and its payments to witnesses, Trial Chamber I, SCSL-04-15-T, 25 June 2008, 3.
[1099] SCSL, *Prosecutor v. Issa Hassan Sesay*, Motion to request the Trial Chamber to hear evidence concerning the prosecution's witness management unit and its payment to witnesses, SCSL-04-15-T, 30 May 2008, 6.
[1100] Ibid., 5 June 2008, para 13.
[1101] Ibid., para 39.

Sunday-lunch excursions to one of the most expensive and exclusive seaside resorts.[1102] This occurred until such time as the WVS decided that the excursions were not necessary and that there were insufficient personnel to carry them out.[1103] The prosecution contended that the WVS then asked the witness management unit to continue the practice.[1104] However, the defence contested that the WVS had ceased the practice because it was not necessary and there were not sufficient personnel. It further contested that the WVS had not asked the prosecution witness management unit to continue the practice, that the witness management unit had engaged the practice of its own volition, and that the defence wished to call the deputy head of the WVS to testify to this.[1105] The defence maintained that only Mr. Ahmed, who was at court ready to testify at that time, and, perhaps, if required, one member of the witness management unit would be required. Despite this the court weighed enthusiasm for an expeditious process ahead of determining whether the prosecution had induced a witness of critical importance to the case.[1106] The prioritization of expediency ahead of ascertaining a key fair trial element indicates the weight the judiciary ascribes to upholding the credibility of the justice process.

Whether finance has been used unethically or not, the rule, witness payments, and previous conduct relating to Mr. Sesay's detention create a perception that discredits the prosecution's evidence. The provision of such a wide protective mandate to the prosecution by those that compiled the rules of procedure and evidence, undermined the

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[1102] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Transcript, Trial Chamber I, SCSL-2004-15-T, 20 June 2007.
[1103] Ibid., 50–51.
[1104] Ibid., 49–50.
[1105] Ibid., 51–52.
[1106] Ibid, 52–59, 61.

legitimacy of the process, reinforced politically informed case selection, and mitigated the standard of justice meted out by the court.

Tim Kelsall examines the in-court affect of witness engagement by prosecution investigative practices, addressing the cleavage between culture and the imposition of international criminal justice.[1107] In Kelsall's examination of the trial of the CDF accused, he illuminates gross falsehoods in the testimony of key prosecution insider witness, Albert Nallo.[1108] These falsehoods were representative of a trend inherent in prosecution witness testimony stemming from the passage of time, illiteracy, traumatic experience, the foreign nature of clocks and dates, the Sierra Leonean culture of secrecy, distrust of court personnel, and the incentive of financial and other material reward.[1109] Kelsall observes a consistent trend on increasing incrimination in the statements of prosecution witnesses as the time to testify drew closer.[1110] The Chamber sided with witness accounts, including that of Nallo who had been shown, through material and witness evidence, to have provided episodes of false testimony and to be totally unreliable.[1111] The chamber claimed to have treated co-conspirator testimony with 'particular caution' and the 'utmost circumspect' and that uncorroborated testimony was subject to 'special scrutiny'.[1112] Instead the chamber stressed a preference for 'orality' precluding challenges to consistency with witnesses' prior statements and relied, in large part, on the testimony of Nallo to

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[1107] See Kelsall 2009.
[1108] Ibid., 219-221.
[1109] Ibid., 171-224.
[1110] Ibid., 171-223.
[1111] Ibid., 220-3.
[1112] Ibid., 219.

secure multiple convictions.[1113] The ambiguous and in the case of Kondewa, metaphysical nature of command was not reflected in the trial chamber's judgment.[1114]

In its judgment the chamber, after rejecting exaggerated or ambiguous elements of his testimony, found that Nallo "testified without hesitation, unambiguously, and in the chamber's opinion, through a genuine desire that the truth be known."[1115] The court neglected to consider that Nallo had been living in Freetown for two years at the expense of the court, that he had provided different accounts to investigators, that a CDF investigation caused him to be removed from his CDF post and that his testimony in public meant he was more likely to be relocated post-testimony.[1116]

4.6 Conclusion

The façade of justice was developed long before witness related elements emerged. The predominant feature of the court's case selection, the prosecution of Charles Taylor was assured in mid 2000 when Richard Holbrook met with Senator Gregg. Judd Gregg's blockage of UN funds provided an external shift in the US position to compliment the change in security dynamics inside Sierra Leone: where the Sierra Leone Armed Forces joined the Kabbah government and fought against the RUF. These two variables constituted a sufficient exogenous shock to shift Sierra Leone's post-conflict transitional justice course away from one in which there was a government of national unity, amnesty, and therefore, no prosecution and no case selection. In the case of Sierra Leone, the UK

[1113] Ibid..
[1114] Ibid., 221.
[1115] Ibid., 222-3.
[1116] Ibid., 223.

enjoyed what Paul Pierson calls 'first movers benefit'.[1117] In being more engaged in Sierra Leonean domestic politics, it was better placed to shape a local and global narrative about events unfolding on the ground. Once that narrative had formed, it was not challenged. That narrative, combined with a political ally in the US Senate, was employed to push the Clinton Administration into a position where it was forced to change its policy towards Liberia and Sierra Leone. The critical importance of the shifting position of the US demonstrates David Malone's view that in 2000, the Security Council largely acts at the behest of the global hegemon.[1118]

SCSL indictments reflected therefore, both US interests, in targeting Charles Taylor, as well as British and Sierra Leonean government interests, in abstaining from indictment of President Kabbah or other supporters of the CDF. The US and Britain shaped the focus of the prosecution by designing the Court's temporal, criminal, personal, and geographic jurisdiction to bring particular personnel under its radar, while excluding themselves and allies. The two powers were able to further focus and control case selection by inserting their own personnel into key prosecution positions, by skewing available information upon which prosecution policy was to be based, and by allowing the Sierra Leonean government to leverage the threat of non-cooperation on investigative access to territory, witnesses and the logistical functioning of the Court.

The structure of the Court then reinforced these prejudices by providing disproportionate power to the prosecution comparative to the defence. Firstly, the donors were able to

[1117] Paul Pierson. *Politics in time: History, institutions, and social analysis*. Princeton: Princeton University Press, 2004.
[1118] Malone 2004.

appoint personnel amenable to their case selection preferences. Consequently, the donors had a vested interest in a stronger prosecution and gave more generously to that Court organ. Thirdly the prosecution were able to go to governments and solicit funds directly where as the defence were dependent on the goodwill of the Registry to lobby on its behalf. Fourth, the court was structured in such a way that the discretion to make provision of material support to protect witnesses was provided to the prosecution, as well as the registry's WVS. The WVS was located within a section of the court to which only prosecution personnel had access and was in the same building as the prosecution's witness management unit, an equivalent of which the defence did not have. With little available documentary or forensic evidence, securing witness testimony was critically important to proving or disproving each case.

Principal-agent theory assists functionalist explanations of the Special Court. The US and UK governments delegated case selection responsibility to the Special Court prosecutor because they knew ad-hoc amnesty for British and other foreign actors assisting President Kabbah removed sovereignty costs.[1119] Similarly they knew that with exclusive design prerogative, unforeseen case selection consequences could be restrained through designed functional constraints such as finance, prosecution appointment, provision of intelligence, and inflated prosecution capacity to produce evidence. When designing actors wield such certainty, Abbott and Snidal suggest high obligation, precision and delegation would be sought given the confidence of the designing actors in case selection.[1120] Concern as to the potential prosecution of British and ECOMOG personnel assisting the Kabbah government

[1119] Miles Kahler, "The causes and consequences of legalization," *International Organization* 54(3) (2000), 661-683, 662.
[1120] Abbott and Snidal 2000, 421–456. 433.

required restrained delegation. Fiscal and tenure constraints were also employed to protect politically sensitive indictments such as those of Muammar Gaddafi and Blaise Compaore. The removal of the ICTR prosecutor for continued investigation of the RPF made tenure constraints more prominent in the minds of the SCSL prosecution. The Government of Sierra Leone also constrained delegation until its ability to assist with investigations of the CDF became clear.

The assertiveness of US policy allowed it to near singlehandedly construct the 'rules and arrangements' of Sierra Leone's transitional justice institutions.[1121] The case of the Special Court exemplifies the dramatic change US hegemonic power can wield, an indication that the SCSL exemplifies hegemonic stability theory.[1122] Sierra Leone and Liberia's revised transitional justice path formed path dependencies, entrenched by increasing returns, in the form of an adopted historical truth, politically amnenable prosecution case selection and a sympathetic Special Court bench. These path dependent variables were shaped by an interventionist institution, who's designing actors, the US and the UK, bore no accountability to Sierra Leoneans. The absence of accountability, allowed those States to shape the Court in their interests whilst maintaining an air of presumed impartiality. This air was facilitated by the absence of pressure from affected constituencies and from norm entrepreneurs[1123] who appeared satisfied that 'something' was being done.

Victor's justice in Sierra Leone enjoyed multiple reinforcing elements not experienced by its predecessors, the ICTY and ICTR. The first was the refusal of the other permanent

[1121] Joshua S. Goldstein. *International Relations*. New York: Pearson-Longman, 2005, 83.
[1122] Ibid., 83.
[1123] As required by Mattli and Woods 2009.

members to allow the Court to hold Chapter VII status or draw guaranteed finance from the UN consolidated fund. This meant that the US and Britain would largely be responsible for funding the SCSL and would not have to placate other states' interests to the same extent it had had to at the previous tribunals. Explaining the narrow nature of State oriented interest in establishing the SCSL is complicated by the utilisation of utilitarian values of global security and the entrenchment of norms of warfare puportedly seeking to protect civilians. Normative explanations of state intent in creating and designing the SCSL disproportionately emphasize liberalist rhetoric deployed to placate fringe civil society elements lobbying for foreign policy more closely aligned with perspectives of economic interdependence and neo-liberalism. These perspectives presume that states act according to a shared interest in restraining action that compromises states interdependent economic interests or according to public opinion which, given free expression, will oppose war and support institutions of collective security.[1124]

The American and British governments behaved 'strategically' as in an 'international system' by clothing realist actions with the conception that they conceive themselves to be 'bound by a common set of rules in their relations', as under the theory of 'international society'.[1125] Abbott and Snidal's statist perspective better explains strong State preference for low delegation and greater manipulative scope while weak States acccept weak delegation so as to mitigate domestic responsibility for sensitive issues, such as a perception of victor's justice.[1126]

[1124] Woods 1996, 14, 16.
[1125] Ibid., 10.
[1126] Abbott and Snidal 2000, 421–456. 449, 452.

The instrument was more effectively wielded by the US and Britain because they retained near exclusive control over court design, and as a consequence, cooperation – a model the US sought to pursue at the expense of the more broadly consultative ICC. To the extent the US attempts to constrain the ICC and the evolution of a case selection norm, the Special Court appears to sugest that a case selection norm 'cascade' is being prevented by the predominant global power. The position of the Sierra Leonean government towards Kabbah's subpoena in the Hinga Norman case dubunked Simmons and Danner's suggestion that the political cost for States reneging deters them from doing so.[1127] If Keohane et al's test of case selection agains the interests of designing actors is employed it is clear the SCSL is not impartial.[1128] The SCSL demonstrates a slow down or reversal in the evolution of a case selection norm and therefore the norm of international crimes prosecution. It does not reflect the cascade that Kathryn Sikking claims is occurring.[1129] In contrast, comparative to the design and function of the ICTR, and to the design of the ICC (see the following chapter) the Special Court represents a shift toward less case selection independence – toward greater regulatory capture.

[1127] Beth Simmons and Allison Danner, "Credible Commitments and the International Criminal Court," *International Organization* 64 (Spring 2010), 225–56, 233.
[1128] Robert Keohane, Andrew Moravcsik and Anne –Marie Slaughter, "Legalized dispute resolution: Interstate and Transnational," *International Organization* 54, 3, (Summer 2000), 457–488. 469.
[1129] Sikkink 2011.

Chapter Five

How the weak play the game: ICC case selection in Uganda

5.1 Introduction

The Rome Statute established the first permanent international criminal court in 1998. The Statute sets itself an ambitious case selection independence goal: "to put an end to impunity" – implying total case selection independence. This chapter examines the cascade or contraction of ICC case selection independence in Uganda. Unlike the ICTR and SCSL, the ICC's designing actors did not have Uganda specifically in mind when negotiating the Rome Statute. In providing the historical context to the Court's design I cast a focused lens on the historical drivers of the Court itself, rather than the Ugandan conflict. I introduce the Ugandan conflict briefly. Then, in sections 5.2 and 5.3, I turn my attention to the emergence of the idea and design of the ICC, considering the contestation between norm entrepreneurs, weak states, and powerful states.[1130]

The Rome Statute's negotiation identifies the contestation between normative advance and realist state interests. That context informs sections 5.4 and 5.5's analysis of the ICC OTP formation and approach to triggering and commencing Ugandan investigations. That section, titled 'Negotiating a referral' is followed by an analysis of the extent to which the law has been objectively applied to the facts of the situation in Uganda. I take the same approach in section 5.7 to case selection in the DRC, focusing on the role of Ugandan nationals. Unlike the SCSL and ICTR, the Ugandan situation, like others, remains

[1130] I consider weak states and powerful states generically as those in the respective global south and north, with powerful states generally referring to the P5.

temporally open. That distinct dynamic has methodological consequences for considering case selection independence. In section 5.8, I consider case selection independence elements not fully present as yet in Uganda. To do so I examine those elements, including complementarity and state cooperation in other ICC situations. Considering relevant situations helps contextualize pressure on OTP case selection independence as a whole. I conclude by considering whether ICC case selection independence is strengthening or weakening.

5.1.1 The rise of Yoweri Museveni and Uganda's civil war

Yoweri Museveni's rise was both dependent upon, and threatened by, British-constructed ethno-regional patrimonial power structures of indirect colonial rule via 'customary' tribal authorities.[1131] Museveni formed, with Rwandan Tutsi exiles, the NRA to challenge his former ally, Milton Obote.[1132] Obote's army and political support were derived from northern groups. Ethnic fractures within Obote's army caused a 1985 coup, political negotiations and a Museveni-led coup in 1986.[1133] Museveni's southern concentration of military, political and economic power isolated and impoverished the north.[1134] The NRA's abuses in the north, particularly Acholiland, prompted former Obote army combatants and Acholi youths to go into hiding or flee to Sudan.[1135] Expatriate Acholi formed the Uganda People's Democratic Army, which aligned with a movement started in northern Uganda by a spiritual healer, Alice Lakwena. Joseph Kony, another Acholi spiritual figure, took

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[1131] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of late colonialism, Princeton*. NJ: Princeton University Press, 1996.
[1132] See Chapter 3.
[1133] Ogenga Otunnu, "The conflict in Northern Uganda: Causes and Dynamics," in Okello Lucima (ed.), *Causes and consequences of the war in Acholiland*. London: Conciliation Resources, 2002, 12.
[1134] Ibid., 12-3.
[1135] Ibid.

control of Lakwena's Holy Spirit Movement in 1988, leading Acholi resistance against Museveni's NRA. Kony renamed the movement the Lord's Resistance Army (LRA). The conflict between the LRA and the government forces (later named the Ugandan People's Defence Forces (UPDF)) concluded in 2005 and 2006 when the LRA fled to the DRC, the CAR and Southern Sudan. The Ugandan government referred the situation on its territory to the ICC in December 2003. Investigations began in mid-2004 and concluded with the indictment of five LRA leaders.

Its internal ethno-regional complexity and bordering and international state actors characterize the Ugandan conflict. One element was Museveni's use of the military state to supply lines of patronage. Regional and global actors have also supported the parties to the conflict. In Southern Sudan, the LRA aligned with the Sudanese government against the Sudan People's Liberation Army (SPLA), which they viewed as allied with Museveni.[1136] The US government supported both Museveni and the SPLA against the Sudanese government. Since the 1990s, Sudanese President, Omar el Bashir had enjoyed Chinese diplomatic and trade support. Egypt, ordinarily a US ally, supported the Sudanese government and LRA against the SPLA and Museveni with a view to maintaining instability and incapacity to dam the Nile River, a resource that is critical to Egypt's economy.[1137]

[1136] Ibid.
[1137] Ugandan Official, 1 December 2012, The Hague, The Netherlands, interview n°29.

5.2 The Commission for an International Criminal Court

The idea of an international criminal court was first raised at the 1919 post-World War I peace negotiations to provide for a special tribunal to prosecute the German Kaiser, a head of state, for waging war.[1138] A confluence of interests between norm entrepreneurs and states temporarily demanded prosecution of illegal war-making. The post-World War II London Conference establishing the International Military Tribunal (IMT) implemented 1919 and 1943 demands for an international criminal response. The IMT's establishment to try international crimes committed by the European Axis Powers planted a seed that led to the Rome Statue.[1139]

In response to the UN Charter's call for studies and recommendations on international law development and codification, the UNGA established the International Law Commission (ILC) in 1947.[1140] In 1948, when passing the Genocide Convention, the UNGA also called for ILC consideration of an international tribunal to try individuals for genocide.[1141] In its first report in 1949, the ILC determined that because war was outlawed, determining its conduct was no longer relevant.[1142] This suggested weak state UNGA majority was the predominant influence over the ILC in advancing criminalization of aggression, but not potentially useful weak-state conduct against a stronger enemy. The ILC, in response to a UNGA request, drafted a 1954 ICC statute that extinguished head of state immunity and

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[1138] Article 227, Treaty of Versailles.

[1139] Charter of the IMT, 8 August 1945, London; Antonio Cassese and Paola Gaeta. *Casesse's International Criminal Law,* 3rd Ed. Oxford: Oxford University Press, 2013, 253.

[1140] UNGA, *General Assembly Resolution 174*, Second Session, 123rd Plenary Meeting, 21 November 1947.

[1141] UNGA, *General Assembly Resolution 260 (A) (B),* Third Session, 179th Plenary Meeting, 9 December 1948.

[1142] Report of the ILC on the work of its first Session, 12 April 1949, Official Records of the UNGA, Fourth Session, Supplement No. 10, A/CN.4/13, 281.

the defence of carrying out a superior's orders, and criminalizing offenses against the peace including;

1. Use or threat of force by one state against another;
2. Preparation of another states armed forces for use against a state;
3. State organization or encouragement of armed groups for incursions into another state, tolerating territorial use for such a purpose;
4. Undertaking or encouraging activities to drive civil unrest or terrorist activities in another state;
5. Annexation of territory of another state, and;
6. Use of coercive economic or political measures to impose its will on another state.[1143]

It did not determine the jurisdiction in which the crimes would be tried.[1144] As weak states came under pressure to align with a cold war power, the UNGA's momentum on aggression slowed requiring a further two decades to define aggression.[1145] However, it retained a broad definition including many of the 1954 elements of waging war by proxy, such as through armed bands, groups, irregulars or other state forces.[1146] The norm of prosecuting aggression withstood powerful state's interests in constraining it.

From 1974 to 1989, the liquidity of global capital flows increased, and with it the degree of pressure powerful states could apply to their weak counterparts. In 1989, the UNGA asked

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[1143] Report of the ILC Covering the Work of its Sixth Session, 28 July 1954, Ninth Session, Supplement No. 9, A/CN.4/88, 151-2.
[1144] Ibid.
[1145] UNGA, *General Assembly Resolution 3314*, 2319th Plenary Session, 14 December 1974, A/RES/3314.
[1146] Ibid., Article 3.

the ILC to address an ICC's establishment.[1147] Only when the Security Council, in 1993, employed Chapter VII power under the UN Charter to itself design and establish the ICTY, did the UNGA demand ILC prioritization of a draft ICC statute.[1148] The Security Council sought to set the agenda and guide the ILC with an ICTY template without jurisdiction over aggression and a Security Council role in triggering any jurisdiction. Weaker UNGA states continued to attempt to accommodate the crime of aggression, including a definition that included intervention and colonialism.[1149] Another critical case selection independence element was primacy of jurisdiction. Some norm entrepreneur states appeared to be willing to place norm enforcement above sovereignty costs by conceding primacy to an ICC, some only for genocide.[1150] However, the majority favored 'opting in' or in some other way retaining primacy.[1151] The question of whether the prosecutor, a state party, the UNGA, the Security Council or any combination thereof would trigger jurisdiction also appeared contested in 1994.[1152] At a point of heightened, post Cold War power, the US, at the outset of considerations, sought to assert clear primacy for its courts over an ICC.[1153]

Power to trigger ICC jurisdiction in the ILC's 1994 draft only considered the Security Council and a State Party.[1154] It appeared that weak and powerful states were considering sharing power to trigger jurisdiction – a departure from the Security Council exclusivity of

[1147] UNGA, *General Assembly Resolution 44/39*, 4 December 1989, A/44/49.
[1148] UNGA, *General Assembly, Resolution 48/31,* Report of the International Law Commission on the work of its forty-fifth session, 48th Session, 9 December 1993, A/48/49.
[1149] See Doc S25704 annexed to UNGA Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the UNGA, Forty-ninth session, Supplement No. 10, A/49/10, 21, 23; Report of the ILC on the work of its forty-fourth session, 4 May - 24 July 1992, Official Records of the UNGA, Forty-seventh session, A/47/10*, 12.
[1150] UNGA, Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, 21, 23-4.
[1151] Ibid., 23-4.
[1152] Ibid.
[1153] Scheffer 2012, 169.
[1154] Schabas 2007, 142.

the ad-hoc tribunals. The draft conceded to both weak and powerful states, primacy of jurisdiction and the gravity criteria as a means of challenging jurisdiction.[1155] The provision of primacy to weak states appeared to be in exchange for major concession to powerful states – de-criminalized war by proxy by opting for the Nuremberg definition of aggression rather than the 1974 ILC version.[1156] Further, the draft provides the Security Council grant jurisdiction over aggression.[1157] Norm entrepreneurs had managed to prevent inclusion of 'interests of justice' case selection criteria, though it could be considered in commuting or pardoning a sentence.[1158] Diplomatic immunities were left open to further debate.[1159]

In response to the draft, the UNGA established an Ad Hoc Committee followed by a Preparatory Committee to consider the court's viability and statute. The Preparatory Committee's text for consideration at the Rome Conference was exhaustive, containing articles with a multitude of options, including the emergence of complementarity – the provision of primacy to domestic proceedings.[1160] A contest between the norms of international crimes prosecution, the interest of major powers, and the interests of weak states would determine case selection independence embedded in the Rome Statute.

[1155] Ibid., 52.
[1156] ILC Report 1994, 38-9
[1157] Ibid., 43.
[1158] Ibid., 67.
[1159] Ibid., 80-4
[1160] Mahnoush Arsanjani, "The Rome Statute of the International Criminal," *AJIL* 93(1) (Jan.1999), 22-43, 22; Schabas 2007, 15.

5.3 The Rome Conference

5.3.1 Explaining negotiations

Observers and participants of the Rome Conference often view it as a consequence of 'unprecedented' input from global civil society – an expression of the normative power of international crimes prosecution.[1161] One method of identifying a norm's advance is to identify court decisions against the interests of the designing actors.[1162] That method can also be applied to the Rome Conference negotiations, considering the extent to which states delegated power by conceding case selection independence to norm entrepreneurs. This method requires consideration of the interests of weak states, as well as powerful states weighed against the interests of case selection independence. Like the other examined cases, I cast a particularly focused lens on the interests and positions of the US, which at the time constituted approximately one-third of the global economy and around thirty-five per cent of global military expenditure.[1163] Participants and commentators commonly view the interests advanced by the US as reflecting those of other P5 states, up until the UK's shift to join the group of 'like-minded' states.[1164] I show, that the UK's shift may also be explained by a calculated move to provide itself and its US ally influence from within the Court. Non-state norm entrepreneurs from international civil society commonly supported the group of like-minded states.[1165] I also argue that despite the rhetorical appeal

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[1161] Marlies Glasius. *The International Criminal Court: A Global Civil Society Achievement*. London: New York: Routledge, 2006; HRW, *World Report 1999*, Special Issues and Campaigns, "The International Criminal Court" including section on NGO role; William Pace and Jennifer Schense, "The Role of Non-Governmental Organizations," in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary-Volume 1*. Oxford: Oxford University Press, 2002, Ch. 2.5

[1162] Keohane et al. 2000.

[1163] Knoema.com, *World Development Indicators (WDI) & Global Development Finance*, The World Bank; Stockholm International Peace Research, SIPRI Military Expenditure Database.

[1164] Arsanjani 1999, 23; Schabas 2007, 18-9.

[1165] Ibid

of 'like-mindedness', that group more closely reflected weak state compromise with strong states as described in the preceding section.

While the US and UK commonly coordinated their policy at Rome, the vast US delegation presented the primary impediment to case selection independence.[1166] The US was supported by P5 states on key issues such as Security Council rights to vet and trigger jurisdiction. The Rome conference placed US government norm entrepreneurs seeking, through their own agency, to marry US policy to norms, at the center of debate. One example is lead US negotiator, David Scheffer. Scheffer concedes his own highly constrained agency, noting enemies he made, and his disappointment with the consequent US position.[1167] The US also experienced a deficit of trust in Rome. When negotiating on the Law of the Sea (UNLOS), the US prolonged negotiations for a decade to allow US-demanded amendments. It then failed to ratify. "How could we possibly trust the United States in these negotiations," negotiators asked Scheffer.[1168] Despite assurances, the US never ratified.[1169] US refusal to accept sovereignty costs endorsed Keohane et al.'s theory of a process moving against a key designing actor indicating a normative advance – an endorsement of the Rome Statute as a 'cascade'. However, it is possible, as with UNLOS, that the US never intended ratification – it simply sought to bind other states to a politically useful norm, without subjecting itself.

[1166] Roger Clark, Diplomat at Rome Conference, 14 October 2013, via telephone, interview n°105; Former Rome Conference delegate and ICC-OTP member, 4 December 2012, The Hague, The Netherlands, interview n°1.
[1167] Scheffer 2012, 165.
[1168] Ibid., 166.
[1169] Ibid.

Despite indications of normative contraction, a number of case selection independence elements signal advance. First and foremost is OTP discretion to assert jurisdiction over crimes by US nationals on States Parties' territory – a particular concern for the hundreds of thousands of US troops deployed around the world and the US Status of Forces Agreements (SOFAs) that provide them local immunity.[1170] Similarly, the definition of weapons particularly concerned the US along with NATO and P5 states. That group unsuccessfully sought to exclude specific reference to 'indiscriminate use' as well as poison, asphyxiating gases, and expanding bullets in the face of the group of like-minded states.[1171] However, powerful states successfully excluded specific reference to bacteriological and chemical weapons as well as nuclear, chemical, and biological weapons.[1172]

The US unsuccessfully argued it be provided the right to vet, veto, or to provide prior consent to any prosecution of Americans, even if it was to join the court.[1173] Behind that demand was the precedent of its willingness, in the face of UNGA condemnation, to reject international law before the International Court of Justice (ICJ).[1174] The US position at Rome became focused on protection of non-parties while arguing for a regime holding parties to it, accountable.[1175] The second of these objectives was in effect compromised by the first in that complementarity would advance the first, but not the second.[1176] Allowing

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1170 Ibid., 167, 171; US Department of State, *International Criminal Court Fact Sheet,* Bureau of Political-Military Affairs, Washington DC, 2 August 2002.
1171 Roger Clark, "Building on Article 8(2)(B)(xx) of the Rome Statute," *New Criminal Law Review: An International and Interdisciplinary Journal,* 12(3) (Summer 2009), 366-389; Clark, 2013.
1172 Ibid.
1173 Scheffer 2012, 168.
1174 UNGA, *General Assembly Resolution 44/43*, 77th Plenary Meeting, 7 December 1989.
1175 Scheffer 2012, 167.
1176 Ibid., 171.

complementarity facilitated an impediment to ICC jurisdiction over US nationals in that the US government could enable domestic proceedings.[1177] It did diminish US capacity to compel domestic prosecution of international crimes as a source of pressure on adversaries, in that those governments could establish politicized proceedings and still satisfy complementarity.[1178]

The US successfully employed its close allies at Rome in shaping its future approach towards the Court. The US and key weak state allies, particularly in Latin America, sought to conceal sharing of intelligence and terrorism and drug related undercover operations by excluding those offences from the Court's jurisdiction.[1179] The US alliance on this issue with the Latin American and Caribbean Group of States (GRULAC) also included the UK and Canada.[1180] This alliance would form a group of cooperating states that would critically influence the election of the prosecutor, the hiring of key prosecution personnel and the ICC's early case selection.[1181] A key actor in driving UK, Canada, US and GRULAC cooperation was Sylvia Fernandez de Gurmendi, an Argentinian diplomat.[1182] When it became clear that the US was not going to go forward with the Rome Statute, the Anglosphere became weak and de Gurmendi's role in providing the GRULAC vote became increasingly important.[1183] The UK and Canadian-led GRULAC group procured the support of the Southern African Development Community through the South African

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[1177] Clark, 2013.
[1178] See section 5.8 of this chapter.
[1179] Scheffer 2012, 169-70.
[1180] Former Rome Conference delegate and member, ICC-OTP, 28 November 2012, Palo Alto, U.S., interview n°80.
[1181] Ibid.; Interview1, 2012.
[1182] Interview80, 2012.
[1183] Ibid.

delegate Medard Rwelamira.[1184] Rwelamira, at the insistence of the UK and Canada, was made the first head of the Secretariat of the ASP.[1185] Similarly, UK and Canadian governments were able to bring on board Prince Zahid of Jordan who delivered the Islamic and Arab group away from the primary source of perceived Anglosphere competition, France and Germany.[1186] Prince Zahid, de Gurmendi and Rwelamira, were induced through their own personal advancement, to orient the positions of their respective supporting states towards the UK and Canada.[1187] The utility of their agency would assist UK and Canadian influence within the OTP while satisfying German and French demands for civil law, rather than common law dominance.[1188]

The conference's working group structure allowed individual or small groups of states to slow the process and bring 'like-minded' states into line – a strategy de Gurmendi was instrumental in facilitating.[1189] This process was particularly critical in securing support for the final issues of the Security Council's filtering role, the crimes the court would cover, and the scope of jurisdiction over non-State Parties.[1190] The inclusion of jurisdiction over nationals of non-States Parties, despite the inclusion of complementarity, limited Security Council discretion to filter cases, and limited and delayed jurisdiction over the crime of aggression, can be considered a major achievement for weak states' interests, and peripherally, for norm entrepreneurs. Like-minded (mostly weak) states' co-option or compromise of norm entrepreneurs facilitated State Party primacy over the ICC. States

[1184] Ibid.
[1185] Ibid.
[1186] Ibid.
[1187] Ibid.
[1188] Interview1, 2012; Interview80, 2012.
[1189] Interview80, 2012.
[1190] Ibid.; Schabas 2007, 20.

Parties also retained the threat of referring crimes by powerful states' nationals on a States Party's territory. For norm entrepreneurs seeking, as Sikkink does, an increase in domestic international crimes prosecution, the level of domestic case selection independence demanded by complementarity would instruct success. That element would also instruct the success of norm entrepreneurs' greatest achievement in advancing case selection independence for international crimes – OTP discretion to trigger, *proprio motu*, an investigation of crimes within the Court's jurisdiction. *Proprio motu* power was not envisaged in the ILC's 1994 draft. However, it was included in the Statute in confrontation to fierce US opposition on the conference's final day.[1191] This discretion allows norm entrepreneurs to prompt *proprio motu* exercise of jurisdiction by communicating information about crimes.

5.3.2 Considering key jurisdictional case selection implications

The Rome Statute established a permanent ICC with jurisdiction over core international crimes.[1192] All ratifying states subject their nationals, and persons acting on their territory, to the Court's jurisdiction.[1193] By lodging a declaration relating to a crime, non-States Parties may also subject incidents by their nationals and on their territory, to the Court's jurisdiction.[1194]

[1191] Interview1, 2012; Schabas 2007, 20.
[1192] Articles 4-10, Rome Statute.
[1193] Ibid., Article 12.
[1194] Ibid., Article 12(3).

The US, along with other permanent Security Council members secured their discretion to refer a situation to the ICC, even one involving a non-state party.[1195] A P5 state can block this action by using their veto power.[1196] A number of weak states and norm entrepreneurs opposed this case selection independence compromise because it subjected Court function to political bodies, undermining its credibility and independence.[1197] Security Council control over ICC jurisdiction is further exaggerated by its power to defer cases for renewable twelve-month periods.[1198] Power to trigger and defer, allow the Security Council to block ICC jurisdiction where its interests are confronted and trigger it where they are advanced. France and the UK are the only P5 states to become States Parties. China has never signed the treaty, while the US and Russia have signed the treaty without ratifying it, allowing these three states to direct the court at other states' nationals without accepting jurisdiction over their own.[1199]

The Security Council's discretion to impede case selection independence was further advanced by the 2010 Kampala review conference, which completed the narrowing of the 1974 definition of aggression.[1200] As already discussed in chapter two, expansion of the crime of aggression to include use of other armed groups or states would advance the interests of weak states hoping to deter conduct that threatened their hold on power. Instead, the final definition requires the act be by a State against the territory of another

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[1195] Ibid., Article 13(b).
[1196] Art 27, UN Charter.
[1197] Lionel Lee "The International Criminal Court and the Security Council: Articles 13(b) and 16," in Roy S. Lee (ed.), *The International Criminal Court : the making of the Rome Statute--issues, negotiations, results.* Boston: Kluwer Law International, 1999,143 at 147.
[1198] Article 16, Rome Statute.
[1199] In 2000, the US suspended their signature obligations under the Vienna Convention. American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Status of the US Signature of The Rome Statute, 11 September 2008.
[1200] Ambos 2010, 463-509.

State, of character, gravity, or scale constituting a manifest violation of the UN Charter, and requires perpetrator command control and awareness of the violation.[1201] Most importantly, the Security Council wields sole triggering jurisdiction over a non-State Party or a non-consenting State Party situation.[1202] This outcome, providing practical exclusion of aggression jurisdiction accompanied by comparatively broad jurisdiction over international humanitarian law, disarms weak states of unorthodox methods of defending strong militaries that are undeterred by the weak criminalization of aggression.

Weak states' incentive to accept a Security Council role was exaggerated by the consequent exclusion of future Security Council-established courts, which entrenches complementarity and domestic proceedings' primacy.[1203] The sovereignty benefits of complementarity for both strong and weak states are enhanced by discretion to exclude their nationals from jurisdiction for seven years after ratification for some crimes.[1204] That time, should they trigger it, allows states to test the political control and complementarity compliance of their respective domestic proceedings. Section 5.8 considers complementarity in depth.

One arguable element of advance is case selection procedure's precision and public policy, diminishing scope for accommodating political pressure. The OTP receives and analyses referrals and communications, assessing reasonable basis for initiating investigations and prosecutions. The OTP's preliminary examination determines jurisdiction to investigate a situation. The OTP's Draft Policy Paper on Preliminary Examinations outlines the applied

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1201 Ibid., 471.
1202 Ambos 2010.
1203 Lee 1999, 146.
1204 Article 124, Rome Statute.

factors and procedures.[1205] The OTP can initiate a preliminary examination if a State Party or the Security Council refers a situation,[1206] or via its *proprio motu* discretion, vetted by the Pre-Trial Chamber (PTC), to investigate crimes on a State Party's territory or by its nationals.[1207] The OTP considers jurisdiction, admissibility and the interests of justice in determining a 'reasonable basis' to proceed.[1208]

Critical to understanding the focus of external cooperative pressure on the ICC is the near total OTP discretion to interpret and apply gravity, exercised through the OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD). The JCCD employs a four-stage 'filtering process' to select situations for investigation.[1209] The first phase, for non-Security Council referrals, assesses all communications on alleged crimes, excluding crimes manifestly outside the Court's jurisdiction.[1210] The second phase commences formal OTP preliminary examination, considering communications and information from the referring entity to determine jurisdiction, gravity, complementarity and the interests of justice.[1211] In this phase the OTP considers jurisdiction over crimes, territory, personal jurisdiction and temporal jurisdiction, beginning for States Parties upon ratification, or after 1 July 2002 for Security Council-referred situations.[1212] The Court's current jurisdiction over crimes includes; war crimes, genocide, and crimes against humanity, the

[1205] ICC-OTP, "Draft Policy Paper on Preliminary Examinations," 4 October 2010, 1.
[1206] Article 13(a-b), Rome Statute.
[1207] Articles 13(c), 15 Rome Statute.
[1208] 53(1)(a)-(c), Rome Statute.
[1209] ICC-OTP, "Draft Policy Paper on Preliminary Examinations," 18.
[1210] ICC-OTP, Annex to the 'Paper on some policy issues before the Office of the Prosecutor': Referrals and Communications (September 2003) 86.
[1211] Article 53(1), Rome Statute.
[1212] Article 12, 22 Rome Statute.

elements of which are further defined by the ASP.[1213] In section 5.6, I closely examine the elements of crimes' interpretation and application in Uganda. In phase three, the OTP considers the conduct's gravity and then whether domestic proceedings render the situation inadmissible (complementarity).[1214] If the situation is admissible, the OTP makes a phase four 'countervailing consideration' as to whether, weighing crimes' gravity and victims' interests, the 'interests of justice' require that the OTP refrain from an investigation.[1215] That criterion allows broad OTP interpretation of a number of variables affecting the following components of the 'interests of the victims'; the parties' views, victims' safety, physical and psychological wellbeing, dignity, interest in seeing justice done and victims and witnesses' privacy.[1216] After a preliminary examination, the OTP may decline to investigate, continue assessing national proceedings, continue collecting relevant information, or initiate investigations.[1217]

5.4 The Status of the ICC at the time of case selection

The OTP was formed under vociferous US attack accompanied by US-allied insertion of favorable personnel in order to capture case selection agency. That agency then sought to protect its discretion from rigorous PTC oversight. These case selection independence

1213 Article 5 Rome Statute; Official Records of the Assembly of States Parties to the Rome Statute of the ICC, First session, New York, 3-10 September 2002, (UN publication, Sales No. E.03.V.2 and corrigendum), part II.B.
1214 See *Prosecutor v Lubanga and Ntaganda*, Annex II, Decision on the Prosecutor's Application for Warrant of Arrest, Article 58, ICC-01/04-01/07, 10 February 2006, para 29; OTP-ICC "Draft Policy Paper on Preliminary Examinations," 51.
1215 OTP-ICC, *Report: on activities performed during the first three years* (June 2003 – June 2006), The Hague, 12 September 2006, 2; OTP-ICC, "Draft Policy Paper on Preliminary Examinations," 10; Article 53(1)(c), Rome Statute.
1216 OTP-ICC "Policy paper on the Interests of Justice," September 2007, 5.
1217 OTP-ICC, Draft Policy Paper on Preliminary Examinations 14.

contractions accompanying weak capacity to compel cooperation overwhelmed normative advance.

5.4.1 The Threat of Cooperative Pressure

A critical indicator of pressure on OTP case selection independence is the Court's confidence in its permanency. This section considers the fragility or stability of the ICC's status in the international system, the drivers of prosecution confidence or concern as to that status, and the effect that confidence or concern had on case selection.

The Court's ability to pursue cases depends on state cooperation on access to territory, accused, witnesses, and other forms of evidence. It does not have power to compel cooperation in domestic courts and is instead predominantly dependent on ASP support.[1218] The US applied enormous pressure during the ICC's formative years. The US threatened not only active obstruction, but also the threat of procuring obstruction from other states. The threat to the court, accompanied by efforts to obtain functional control effectively granted the OTP a trial period in which to demonstrate its US foreign policy utility – the utility of advancing US interests through case selection. US policy makers' concern that US nationals could be pursued and that the Security Council was ceding power would be balanced by the strategic and moral benefits of engaging and directing case selection at adversaries.[1219]

[1218] Articles 86-9, Rome Statute.

[1219] Richard Haas, Former US State Department Director of Policy Planning, Forward, in Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*. Council Special Report No. 55. Council on Foreign Relations Press, April 2010, vii.

The US sought Article 98 Agreements with States Parties obligating those states to render US nationals to the US rather than the Court. The US cited a number of concerns, mostly protestations at sovereignty costs of case selection independence, including; potential exclusion of Security Council filtering of aggression cases, OTP and PTC discretion to trigger jurisdiction, exclusion of states' right to attach reservations, and OTP discretion to determine complementarity. The US emphasized its preference for domestic proceedings and the continuing alternative of Security Council established tribunals.[1220] The US government position was accompanied by legislation granting US nationals' ICC immunity and allowing any means necessary to free them from ICC custody.[1221] Uganda, who the US viewed as an ally, a regional source of stability and a positive AU member, would provide the US government an ideal test case for ICC viability.[1222] Despite the external pressure, norm entrepreneurs within OTP believed that scope remained for OTP functional independence as far forward as 2003. However, they acknowledge that independent space had closed within twelve months.[1223] U.S. government officials assessed that the ICC "pragmatically speaking… was never going to go down that [UPDF] road and wouldn't in its current state because its credibility is so much in question."[1224] External actors were confident realist considerations overwhelmed those of norm advancement within the OTP.

[1220] US State Department, *International Criminal Court*, Bureau of Political-Military Affairs, 2 August 2002.
[1221] Sections 2004, 2005, 2006, 2007, 2008, American Service-members' Protection Act 2002.
[1222] Former Advisor, US Mission to the UN, 28 October 2012, Auckland, New Zealand, interview n°2.
[1223] Interview1, 2012.
[1224] Member, US Department of State, 6 November 2012, Washington D.C, USA, Interview n°47.

5.4.2 The Formation of the OTP

The first indicator of functional OTP independence was the prosecutor's election. Under the Statute, the ASP elects the ICC prosecutor by majority.[1225] This system broadens participation from the Security Council-provided list for the ICTR, or the SCSL's donor-instructed appointment by the UN Secretariat. However, like the SCSL, the US and UK governments were particularly concerned to avoid a prosecutor like Del Ponte, that could pursue cases confronting US or UK interests. Louis Moreno-Ocampo was the US, UK and Canada's favored candidate.[1226] The US government had favoured Ocampo to be ICTY prosecutor, which was blocked by the Argentine government.[1227] Because the US was not a State Party, its allies, the UK and Canada led Ocampo's campaign.[1228] For the British, Canadian and US governments, an Argentinian candidate satisfied continental European demands for a prosecutor of non-Anglophone, civil law background.[1229] The GRULAC states and Sylvia Fernandez de Gurmendi became critical agents in this effort.[1230] Ocampo's campaign was lead by de Gurmendi, Ocampo and another Argentine delegate to the Rome Conference, Fabricio Guariglia.[1231] Despite absent Argentinian support, the trio provided the GRULAC vote. Then, working with key British and Canadian diplomats, they sought European States Parties.[1232] The election was delayed from February to March 2003, with the nominations to have been posted on the UN website.[1233] Weak states held a

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[1225] Article 42(4), Rome Statute.
[1226] Interveiw1, 2012; Interview80, 2012.
[1227] Scheffer 2012, 31.
[1228] Interveiw1, 2012; Interview80, 2012.
[1229] Interview1, 2012.
[1230] Matthew Brubacher, Analyst, Jurisdiction, Complementarity and Cooperation Division, ICC-OTP, 15 July 2013, via telephone, interview n°106; Interview80, 2012.
[1231] Interview80, 2012.
[1232] Ibid.
[1233] Allison Marston Danner, "Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel," *Stanford Law Review* 55(5) (May 2003), 1633-1665.

greater interest in expeditious forming of the OTP to mitigate potential Security Council exploration of an alternative institution. In an act that strengthened powerful states' bargaining power, the ASP President, Prince Zeid Al-Hussein called for an election by consensus, a process that diminished the independence provided to individual states by a secret ballot.[1234] Prince Zahid discredited the continental European candidate in the ASP meeting.[1235] Ocampo was elected unopposed by all seventy-eight ASP members.[1236]

Once elected, Ocampo enjoyed significant discretion in allocating resources and hiring personnel. The OTP is purportedly protected from state insertion of personnel via the prohibition of gratis personnel from states parties or NGOs unless in 'exceptional circumstances.'[1237] However, the principle of personnel independence was undermined by Ocampo's crony-like recruitment enabled by his Article 42(2) "full authority over the management and administration of the Office."[1238]

Ocampo immediately hired de Gurmendi as Special Advisor and Director of the JCCD and Fabricio Guariglia as Appeals Counsel.[1239] De Gurmendi hired the two leading actors in Ocampo's campaign from the UK and Canada, as consultants.[1240] De Gurmendi then hired into the JCCD Gavin Hood, the British Foreign and Commonwealth Office desk officer for international criminal justice issues who had also worked on Ocampo's campaign. Multiple personnel within the OTP, registry and Ugandan government believed Hood

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[1234] Ibid; ICC-ASP, First Session (Resumed), 9th Meeting, 21 April 2003, L/3035.
[1235] Interview1, 2012.
[1236] ICC ASP, First Session (Resumed), 9th Meeting, 21 April 2003, L/3035,
[1237] Article 44(4), Rome Statute.
[1238] Cecilia Balteanu, Head of Field Strategic Coordination and Planning Unit, Registry 4 December 2012, The Hague interview n°52.
[1239] Interview80, 2012.
[1240] Ibid.

sought to shape OTP operations in the interests of the British government.[1241] Hood previously worked in the OTP of the SCSL and ICTY, where he was familiar with "what institutional information dependency translates into in terms of the ability of governments to influence the office, all at a very subtle level."[1242] Hood also had a security background, and had served as the legal advisor to the Coalition Provisional Authority in Iraq in 2003.[1243] Subsequent to his time in the OTP he served as Washington liaison between British and US national security and intelligence agencies and then as chief of staff to the US intelligence company, Palantir.[1244] Hood would play a leading role in situation and case selection in Africa's Great Lakes.[1245] De Gurmendi also hired Darryl Robinson, the Canadian Foreign Affairs legal officer who had been engaged in the Rome Conference and in the election of Ocampo.

5.4.3 Realist OTP actors defend against precise PTC-imposed criteria

Some OTP personnel felt that British and Canadian interests were not only capturing the office and case selection discretion, but also sought to protect broad (imprecise) case selection discretion from judicial oversight.[1246] During a formal investigation, each situation is assigned a PTC, which verifies a case's charges, warrants of arrest or summons to appear.[1247] However, norm entrepreneurs allowed state delegates "primarily concerned

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[1241] Interview80, 2012; Interview1, 2012; Balteanu, 2012; Interview29, 2012.
[1242] Interview80, 2012; Interview1, 2012.
[1243] Interview29, 2012; Shane Harris. "Palantir Technologies Hires British Security Official," *Washingtonian,* 29 June 2012.
[1244] Ibid.
[1245] Gavin Hood, Former senior policy advisor to the Chief Prosecutor, ICC-OTP, 24 May 2013, via telephone, interview n°107.
[1246] Interview80, 2012; Interview1, 2012.
[1247] ICC "The ICC at a Glance: What is the ICC?" in M.S. Ellis and R.J. Goldstone (eds.) *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century.* New York: IBATE Press, 2008, 29 at 32-33.

with the implementation of a system that would protect their sovereignty" to exclude serious judicial scrutiny of the OTP's criteria application.[1248] Article 53 enables the OTP to jealously guard against judicial review, and defeat serious oversight or specified precision of key case selection criteria – including crimes' 'gravity'.[1249] In 2006, the OTP forcefully argued before a closed Status Conference for near sole discretion to determine gravity,[1250] despite jurisprudence acknowledging PTC discretion to:

"… request the Prosecutor to provide specific or additional information ... that the PTC considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b)"[1251]

The Rome Statute's preamble, and Articles 1 and 5, indicate that any crime falling within the court's jurisdiction is 'grave'. The Prosecution asserts imprecision, citing application of gravity to situation's admissibility as intended to establish a basic standard that is not overly restrictive.[1252] However, a 'case' within a situation requires case-specific gravity consideration of the crimes and the extent of a perpetrator's responsibility.[1253] The PTC employed a literal, contextual and teleological interpretation to require systematic or large scale conduct considering the social alarm caused, the seniority of the accused, the

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[1248] G. Bitti, "Article 53 – Ouverture d'une enquête," in Julien Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*. Paris: Editions Pedone, 2012, 1173-1228, 25-6.
[1249] Ibid.
[1250] ICC-OTP, "Submission Providing Information on Status of the Investigation In Anticipation of the Status Conference to be Held on 13 January 2006," 11 January 2006, ICC-02/04-01/05, 5; Interview1, 2012.
[1251] ICC-PTCII, "Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53," 2 December 2005, ICC-02/04-01/05, 4.
[1252] OTP-ICC, "Draft Policy Paper on Preliminary Examinations," 67-8.
[1253] Fabricio Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court," in Carsten Stahn and Goran Sluiter (eds.) *The Emerging Practice of the International Criminal Court.* Leiden, Boston: Martinus Nijhoff Publishers, 2009, 209-217, at 213.

accused's role in conduct and the scope of the accused's group's activities.[1254] The PTC, seeking to maximize the deterrent effect, demanded application of ICTY and ICTR criteria focusing on the 'most senior' leaders.[1255] The PTC identified *de jure* or *de facto* authority to sign or implement ceasefires and peace agreements.[1256] The Appeals Chamber contested the term 'social alarm' because of its absence from the Statute ignoring similar absence among OTP-established criteria.[1257] In avoiding the 'those most responsible' criterion, the OTP avoids enhanced case selection precision and independence by allowing resource allocation towards ending impunity for those middle level, and politically less sensitive actors at the expense of pursuing the most powerful. The Appeals Chamber rejected the PTC gravity interpretation citing imprecise ILC and Preparatory Committee language, and deliberately inserted Statute qualifications as allowing voluntary OTP adoption of key criterion, no requirement to satisfy all criteria, and the absence of statutory requirement to pursue the most serious perpetrators.[1258] The Appeals Chamber rejected ICTY/R criteria because the Security Council adopted them during those Courts' concluding operations, whereas the ICC remains in its early stages.[1259] The Appeals Chamber ignores OTP resource and time constraints that I consider in 5.8. I examine OTP criteria application in Ugandan in section 5.6.

[1254] Ex parte, Prosecutor only, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber 1 entitled "Decision on the Prosecutor's Application for the Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04, 14-5.
[1255] Ibid., 15.
[1256] Ibid., 15-6.
[1257] Ibid., 20-22.
[1258] Ibid., 18-20, 22.
[1259] Ibid., 21.

5.5 Negotiating a referral, negotiating legitimacy

Less than a month after Ocampo's July 2003-swearing in, the OTP announced Ituri, DRC as the most urgent situation.[1260] However, fear of sovereignty costs and unforeseen consequences prevented Congolese government referral of the situation, while the OTP refrained from triggering investigations via *proprio motu* powers without Congolese commitment to cooperate. The OTP also viewed the Ugandan and Colombian situations as of sufficient gravity to fall within its jurisdiction.[1261] The Ugandan situation presented an Anglo-American opportunity to orient the office away from a francophone situation during a critical period of court recruitment.[1262] It could also advance Anglo-American interests by entrenching a narrative that stigmatizes its adversary, the LRA, while absolving an ally, the UPDF. OTP exclusion of UPDF cases could temper heightened US sovereignty concerns in a post-911 environment. Broad OTP case selection discretion was required to achieve this outcome. However internal OTP contestation as to the transparency of situation analysis developed. Some personnel favored full disclosure of case selection criteria application to redacted collected data.[1263] The OTP leadership viewed that approach as too scientific, and prohibitive of qualitative considerations. Instead a generic and less scientific reporting approach, allowing greater interpretive discretion was adopted, allowing greater accommodation of Ugandan and other government's sovereignty cost concerns.[1264]

1260 Akhavan 2005, 405.
1261 Interview1, 2012; Interview80, 2012.
1262 Interview80, 2012.
1263 Paul Seils, Former Head of Situation Analysis, ICC-OTP, 16 December 2011, New York, USA, interview n°96.
1264 Ibid.

A State referral of a situation within the referring State's territory was considered unlikely at the Rome Conference.[1265] However, two key leading OTP actors, Silvia Fernandez de Gurmendi and Gavin Hood, negotiated with the Ugandan government to secure state referral and investigative cooperation.[1266] The Ugandan government viewed Hood as very forthcoming in terms of assisting their understanding of potential crimes the court would pursue, and complementarity requirements.[1267] Ugandan diplomats, like some OTP personnel, believed Hood sought to advance British interests, through the OTP.[1268]

The Ugandan government was skeptical that the ICC would pursue UPDF as well as LRA crimes. The Ugandan National Security Council were conscious that "the ICC at the time wanted to have a successful case, or a case that could succeed to justify its budget, its existence and so forth."[1269] They cited a 'confluence of interests' with Ugandan government interest in deploying an ostensibly impartial instrument of pressure against the LRA leadership – "to deploy all elements of power to end the war in a very integrated way."[1270] However, concern remained among Ugandan Security Council members that a 'gamble' was being waged if public OTP assurances could not be procured.[1271] The Ugandan government carefully weighed its cooperative capacity to make UPDF crimes a "no-go area" by allowing the OTP to "go ahead, up to a point".[1272] Critical to this assessment were US assurances, during a 2003 Ugandan visit to the Whitehouse and State

1265 Former US Department of State official, 8 November 2012, Washington, USA, interview n°34.
1266 Interview1, 2012; Brubacher, 2013; Pascal Turlan, Judicial Cooperation Adviser, ICC-OTP, 5 December 2012, The Hague, The Netherlands, interview n°46; Hood, 2013.
1267 Interview29, 2012.
1268 Ibid.
1269 Former member, Ugandan National Security Council, 19 November 2012, Kampala, Uganda, interview n°93
1270 Ibid.
1271 Ibid.
1272 Ibid.

Department, that the OTP was unlikely to pursue UPDF crimes.[1273] The Ugandan government formed the view that the ICC "was so desperate to do something, and to have a profile, and justify its existence and so forth" that it would not pursue UPDF crimes and in so doing deter other government self-referrals.[1274] Despite growing confidence, some National Security Council elements remained concerned about a change in OTP position, analysis or interests down the road. A former National Security Council member advised: "Whether this ICC was going to turn on us later on, you're riding on the back of a tiger, and whether the tiger would finally turn its back on you…so I was saying, but be careful because the day a tiger gives you a lift, okay, you have to be careful – where is it taking you? It may take you to a destination where it will settle down under a tree and start to work on you. So how sure are you that this process will only go for Kony and not for the UPDF?"

The Ugandan government adopted then Minister of Defence, Amama Mbabazi's position: "One, we are the ones who have referred the case, two, we are cooperating, and three, there are systems for handling UPDF within its own codes of conduct, within its own military courts … complementarity, the ICC that will come to take over, they are not all cases, 'severe cases', you know - all these arguments were kicked in."[1275]

After negotiations and legal advice, the Ugandan government became confident the OTP would view UPDF abuses as of insufficient gravity and that it would be satisfied with UPDF accountability processes. The OTP received documentation of court martial cases

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[1273] Ibid.
[1274] Ibid.
[1275] Ibid.

ostensibly to satisfy complementarity.[1276] The Ugandan government also sought the demonstrative effect of constructive Ugandan global citizenship accompanying referral and state cooperation while using cooperation to 'shape' and 'influence' investigations "so that it does not come to look for its own."[1277] Ugandan government confidence was derived from its superior sophistication in dealing with external diplomatic actors.

"Kampala regime had managed to dupe all kinds of diplomats in Kampala – they give you the official version … gets all the diplomats to look at it this way … even when the regime is doing something else … We've mastered that art."[1278]

Museveni also understood that global power alliances do not easily shift. Museveni linked Anglo-American security interests in places like Somalia, the DRC and Rwanda to narratives legitimizing security sector cooperation with his government.[1279] Museveni believes his regional role provides a level of immunity for UPDF and UPDF-supported abuses in Uganda and the region.[1280]

5.5.1 Constructing expedient legal explanations

Museveni's government attempted to strengthen its geopolitical calculation by signaling technical legal expectations to the OTP. The government hired former ICTY prosecutor and McGill University academic, Payam Akhavan as an advisor.[1281] Akhavan attempted to explain ICC case selection in a published article. His bias is immediately apparent in the

[1276] Interview29, 2012.
[1277] Interview93, 2012.
[1278] Ibid.
[1279] Ibid.
[1280] Ibid.
[1281] Van Schaak, 2012; Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *AJIL* 99(2) (Apr. 2005), 403-421, 403.

framing of Ugandan referral as an attempt to bring 'LRA atrocities' to an otherwise aloof international community's attention.[1282]Absent from descriptions of the 'gravity and notoriety of LRA abuses' is any serious consideration of UPDF crimes.[1283] For example, in describing UPDF forced displacement, Akhavan notes, "Hundreds of thousands of civilians have simply abandoned their homes and sought shelter in "protected villages" where the UPDF provides security."[1284]

However, Akhavan does appear to acknowledge Ugandan self-interest. He observes that the Ugandan government did not consider the ICC option as the Rome Statute entered into force. He also identifies 'nascent' ICC interest in demonstrating viability by addressing an 'exceptional situation' thereby procuring international confidence in its mandate.[1285] Akhavan acknowledges OTP reluctance to facilitate 'a potentially adversarial relationship' when dependent on state cooperation, citing OTP reluctance to employ *proprio moto* triggering of jurisdiction in the DRC.[1286] He also concedes the government's Acholiland security interest in pressuring LRA leaders.[1287]

Despite the above political considerations, Akhavan cites the de-politicizing effect of ICC prosecution of LRA crimes, ignoring among other politicizing elements, the exclusion of crimes prior to 1 July 2002.[1288] He asserts Ugandan complementarity compliance – Uganda

[1282] Ibid., 404.
[1283] Ibid.
[1284] Ibid., 409.
[1285] Ibid., 404, 410.
[1286] Ibid., 404-5.
[1287] Ibid., 404.
[1288] Ibid.

"was not relinquishing a responsibility that it could discharge on its own."[1289] Akhavan considers whether investigations, if impeding peace negotiations, impinge "the interests of justice."[1290] He expects consideration of the ICC's potential destabilizing impact.[1291] On this issue, Akhavan cites LRA stigmatization by ICC investigations as driving Sudanese consent to UPDF attacks on LRA camps in Sudan.[1292] He also cites destabilizing Sudanese government support for the LRA without considering Ugandan support for the SPLA or the impact on peace and stability of pushing the conflict across borders.[1293] He cites OTP interpretation of local peace efforts, but neglects to consider what OTP analysis might be based on.[1294] Government-provided information could emphasize a detrimental LRA impact on peace processes, endorsing LRA indictments, despite Acholi and other Ugandan civil protestation.[1295] Akhavan's premise, with little empirical support, is that investigations apply inherently stabilizing pressure.[1296] Continued LRA atrocities disprove this. He cites LRA divisions and defections as prompted by ICC indictments and LRA disinterest in peace.[1297] While these interpretations neglect the possibility that LRA fear of potential apprehension prohibits peace negotiations,[1298] it provides a ready-made legal-historical narrative for OTP deployment.

[1289] Ibid., 404-5.
[1290] Ibid., 404.
[1291] Ibid., 416.
[1292] Ibid., 404.
[1293] Ibid., 416; For consideration of cross-border implications, see: Tim Allen. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*. New York: Zed Books, 2006.
[1294] Akhavan 2005, 416.
[1295] Ibid., 416.
[1296] Ibid., 418.
[1297] Ibid., 417.
[1298] Adam Branch. *Displacing Human Rights: War and Intervention in Northern Uganda.* Oxford: Oxford University Press, 2011.

Akhavan's analysis mirrors the Ugandan government's conditioned commitment to cooperate. For example, he asserts; "Uganda's objectives were fully compatible with the purposes of the ICC."[1299] He then states, "although Uganda initiated the state referral, it could in no way impose its own judgment or preferences upon the ICC," an assertion followed with descriptions of crimes and culpability excluding UPDF offenses.[1300] In addressing civil society demands that both parties to the conflict are prosecuted, he notes OTP discretion to determine a "reasonable basis to proceed" and Museveni's promise of cooperation.[1301] He then caveats that view with Ugandan determination to prosecute crimes itself, quoting Museveni: "I am ready to be investigated for war crimes ... and if any of our people were involved in any crimes, we will give him up to be tried by the ICC … And in any case, if such cases are brought to our attention, we will try them ourselves."[1302]

5.5.2 The referral and investigations

On the basis of a shared understanding that UPDF crimes would not be pursued, but nonetheless enthusiastically seeking the credibility of cooperation, Uganda's Attorney General submitted a December 2003 letter referring to the ICC the "situation concerning the Lord's Resistance Army" in northern and western Uganda.[1303] The prosecutor and the Ugandan President jointly announced the referral at a London hotel in January 2004. By February 2004, the Ugandan government indicated its confidence of OTP capture by making a "Declaration on Temporal Jurisdiction" placing all crimes from 1 July 2002 in

[1299] Akhavan 2005, 411.
[1300] Ibid.
[1301] Ibid.
[1302] Ibid.
[1303] Situation in Uganda, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, PTC II, 27 September 2005, ICC-02/04-01/05, 9-10, para 30.

the Court’s jurisdiction.[1304]

Within the OTP realist actors recognized that UPDF investigations would cause cessation of government cooperation.[1305] Those personnel sought to obstruct or exclude norm entrepreneurs within OTP from investigation and data analysis.[1306] Their approach was considered ‘too scientific’.[1307] Excluded personnel believed Gavin Hood, who led investigations, would avoid serious UPDF investigation.[1308] The Prosecutor not only sought to have excluded personnel barred from influencing investigations. When an excluded OTP officer joined the PTC, Ocampo sought to have him barred from rendering advice.[1309]

The investigation secured cooperation from the Ugandan government, facilitating the accompaniment of OTP investigators by the UPDF divisional commander when seeking witnesses.[1310] The Ugandan government could therefore easily monitor ICC investigators, despite the OTP strategy of short missions.[1311] The difficulty of obtaining insider witnesses of UPDF crimes, combined with short investigations and UPDF monitoring, undermined OTP capacity to independently pursue both parties to the conflict. UPDF intimidation of

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[1304] Situation in Uganda, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 10, para 32.
[1305] Beatrice Le Fraper du Hellen, Head of Jurisdiction, Complementarity and Cooperation, ICC-OTP, 8 June 2009, The Hague, The Netherlands, interview n°57.
[1306] Interview1, 2012; P*rosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on the Prosecutor’s request to separate the Senior Legal Advisor to the Pre-Trial Dvision from Rendering Legal Advice regarding the Case, 31 October 2006, ICC-02/04-01/05, 2.
[1307] Seils, 2011.
[1308] Interview1, 2012.
[1309] Ibid.
[1310] Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics & International Affairs* 21 (2007), 179–198, 188.
[1311] Mahony 2010, 31-4.

witnesses of UPDF crimes further undermined potential UPDF cases.[1312] At this infant stage, OTP capacity was very limited; meaning a proper analytical application of criteria was difficult.[1313] Investigations, for which ad-hoc practice and procedure was adopted, concluded 'very very quickly' with early 2005 indictments of the LRA leadership only.[1314] The approach to the investigation provided disproportionate scope for politicized discretion – discretion provided to individuals with a history of placing state interests ahead of objectivity.

5.6 Rationalizing partisan prosecution case selection

This section considers the various explanations provided by the prosecution for the cases it selected in the Ugandan situation. I firstly identify contestation between observers and the OTP. The gravity arguments advanced by the prosecution reflect consideration of acts such as killing, torture, and sex crimes committed disproportionately by the LRA compared to the UPDF.[1315] For that reason, my analysis excludes such UPDF conduct despite potential interpretation that UPDF rape and torture was qualitatively grave because of the vulnerable circumstances of the victims within Internally Displaced Persons (IDPs) camps.[1316] I therefore focus on the contentious UPDF conduct of alleged UPDF directed and compelled movement of populations into IDP camps.

[1312] Le Fraper du Hellen, 2009; Tim Allen, *War and justice in northern Uganda: An assessment of the International Criminal Court's intervention.* Crisis States Research Centre, Development Studies Institute, London School of Economics, February 2005, 63.
[1313] Seils, 2011.
[1314] Brubacher, 2013.
[1315] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*; US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2003,* 25 February 2004; US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2004,* 28 February 2005; US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2002,* 31 March 2003.
[1316] Ibid.

OTP Regulation 29 (2) instructs definition and application of gravity to 'situations' based on "various factors, including their scale, nature, manner of commission, and impact".[1317] In its 'scale' considerations, the OTP cites the number of victims and crimes' geographic and temporal scope.[1318] Critics of 'scale' cite difficulty in establishing victim numbers, the lack of qualitative criteria[1319] and a proper methodology as to the objects of comparison.[1320] The OTP considers that all ICC crimes "are crimes of concern to the international community and, as such, grave in themselves."[1321] The OTP refers to the *manner of the commission*, including aspects of particular cruelty, crimes against particularly vulnerable victims (including discrimination, abuse of *de jure* or *de facto* power, and, an 'added factor' e.g. crime increasing population vulnerability (e.g. attacking peacekeepers). Disagreement within the OTP emerged about some of the criteria. The *Impact* criterion, for example, was favored by the Chief Prosecutor but not by many other OTP members.[1322]

Perceptions of OTP criteria application to the Ugandan situation were colored by pre-referral OTP negotiations with Museveni and the prosecutor's indication, shortly after

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[1317] Regulations of the OTP, entry into force 23 April 2009, ICC-BD/05-01-09. See also ICC-OTP, *'Report on the activities performed during the first three years (June 2003-June 2006)',* 12 September 2006, 6, and ICC-OTP, *'Report on Prosecutorial Strategy'*, 14 September 2006, 5, referring to the scale and nature of the crimes, the manner of commission and the impact of the crimes.
[1318] Guariglia 2009, 209, 214.
[1319] K. J. Heller, "Situational Gravity under the Rome Statute," in C. Stahn and L. van den Herik (eds.) *Future Perspectives in International Criminal Justice*. The Hague: T.M.C. Asser Press, 2010, 227, 229.
[1320] Schabas 2007, 190; W. Schabas, "Prosecutorial Discretion and Gravity" in Carsten Stahn and Goran Sluiter (eds.) *The Emerging Practice of the International Criminal Court.* Leiden, Boston: Martinus Nijhoff Publishers, 2009, 229, 245-6.
[1321] ICC-OTP, Criteria for Selection of Situations and Cases, Draft for discussion, June 2006, para 16.
[1322] Seils, 2011.

referral that LRA conduct constituted crimes against humanity.[1323] Many perceive that a deal had been forged excluding the UPDF from the prosecution's case selection radar.[1324] Phil Clark suggests that Ugandan and Congolese governments preyed on ICC dependence on State cooperation, focusing investigations on their enemies and away from themselves.[1325] However, his analysis did not appear to be corroborated by OTP sources. Similarly, William Schabas asserts that it appears the OTP acts more in the interests of the State parties and with respect to an accused's availability, than an objective application of law to fact.[1326] The OTP forcefully rejects these assertions, describing them as "based more often than not on what appears to be observer bias rather than rigorous objective analysis."[1327] This section attempts to apply law to fact in the Ugandan situation.

5.6.1 The contentious conduct

From 1996 up to and including the time of ICC investigations, the UPDF employed a strategy of massive displacement into enormous IDP camps that had lasted years, and in some cases over a decade.[1328] The camps received both civilians fleeing their homes and those the UPDF forcibly displaced. The UPDF strategy, which focused on rural Acholi, was to facilitate UPDF operations by removing the LRA's social base of food and

[1323] Akhavan 2005, 412.
[1324] Clark 2010.
[1325] Ibid.
[1326] William Schabas, "Prosecutorial Discretion *v*. Judicial Activism at the International Criminal Court," *J Int Criminal Justice* 6 (4) (2008), 731-761; William Schabas, "Victor's Justice: Selecting "Situations" at the International Criminal Court," *J. Marshall L. Rev*. 43 (2010), 535-539.
[1327] Rod Rastan, "Comment on Victor's Justice & the Viability of Ex Ante Standards," *J. Marshall L. Rev.* 43 (2010), 569-602, 575.
[1328] Adam Branch, "Against Humanitarian Impunity: Rethinking Responsibility for Displacement and Disaster in Northern Uganda," *Journal of Intervention and Statebuilding* 2(2) (2008), 151-173, 153; HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, Vol 17, No. 12(A), September 2005, 69.

support.[1329] The Ugandan government consistently cited civilian protection as justification for the camps' establishment.[1330] Dan Branch found that:

"displacement occurs through widespread violence by the government against the civilian population, including murder, torture and the destruction of property. Displacement in Uganda has been sustained through government violence against those found outside the camps and also against those inside the camps who openly oppose the government's policy of displacement."[1331]

HRW found that the 2004 Northern Ugandan population, during ICC investigations:

"is confined to living in internally displaced persons camps by an LRA campaign of terror directed against persons it imagines to be "with" the government and by constant coercion and intimidation by the UPDF—which moved tens to hundreds of thousands into camps for their safety. The civilian protection provided by herding people into camps, at the cost of their livelihoods, health and education, has been questionable."[1332]

The IDP camps' humanitarian situation was dire. Mortality rates reached 1000 people per week in 2005 and 2006.[1333] Conditions compelled IDPs to embark on dangerous external trips to collect food rendering them vulnerable to LRA and UPDF abuses.[1334] The UPDF controlled, through beatings, detention and torture, the distance and time of travel outside the camps.[1335] The Ugandan government requested World Food Program (WFP) food-aid

[1329] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 69; Branch 2008, 153.
[1330] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 69.
[1331] Branch 2008, 162.
[1332] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 62.
[1333] Branch 2008, 153.
[1334] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 63.
[1335] Ibid., 64.

for over 200,000 IDPs by November 1996, acknowledging very early that it could not provide IDPs a superior level of human security.[1336] Until that time agencies had played a limited role in Northern Uganda.[1337] By 2003, the consolidated appeal had risen to $148 million, around half of which was for food aid.[1338] The ostensible intent of enhanced security behind population transfer to IDP camps is further undermined by the provided protection described as 'dismally inadequate' and 'less secure' than that enjoyed prior to forced transfer into the camps.[1339] Branch describes UPDF-provided security as rendering IDPs "easy prey for rebel violence, in contrast to their situation at home," an interpretation he suggests is supported by IDPs attempts to leave.[1340] HRW recommended that the ICC "investigate crimes falling within the jurisdiction of the ICC committed by all parties to the conflict, including the UPDF."[1341]

5.6.2 Considering gravity

The Prosecutor did not significantly reference 'gravity' in case selection and admissibility, until mid to late 2005.[1342] The gravity criterion has been developed by the OTP's 2006-policy paper by citing four key criteria addressed above. The 2006 OTP policy paper, declines to attribute specific weights or scientific application of the variables, but rather "a craft, based on guiding principles but sufficiently flexible to address the infinite variety of factual scenarios."[1343] In the Ugandan situation, the prosecutor specifically cites LRA

[1336] Branch 2008, 155-6.
[1337] Ibid., 156.
[1338] Ibid., 158.
[1339] Ibid., 162.
[1340] Ibid.
[1341] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 74.
[1342] Schabas 2009, 231; Ignaz Stgmiller "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda,*" *ICLR* 9 (2009), 547.
[1343] Seils 2009, 57.

crimes as "much more numerous and of much higher gravity" than those by the UPDF.[1344] The OTP contention is that UPDF crimes do not meet the gravity threshold – a view the US Department of State shares.[1345] I argue that UPDF conduct clearly constitutes the crime against humanity of forcible transfer of the population, or the war crime of forcible transfer of the population, or the war crime of confinement and meets the 'scale' threshold of gravity.

To be culpable for forcible transfer of the population or confinement, key elements must be present in the offending party's conduct. The ICTY found that forcibly and compulsorily transferring civilians "in furtherance of a well organized policy whose purpose was to expel the Bosnian Muslim population" from an enclave "under Bosnian Muslim control" constituted the crime against humanity of deportation or forcible transfer of the population.[1346] Analogous elements are present in the UPDF conduct. Of the elements necessary to determine the crime,[1347] the OTP does not appear to dispute that; the transferred population were lawfully present in their towns and villages, the UPDF was aware of their lawful presence, the transfer of the population was widespread or systematic, and it was directed against the civilian population.[1348] Some OTP officers do not contest the first element of the crime,[1349] that the transfer was 'forcible' in many

[1344] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants,* The Hague, 14 October 2005, 2-3.
[1345] Member of the Office of the Prosecutor, International Criminal Court, 3 December 2012, The Hague, The Netherlands, interview n°76; Brubacher, 2013; Turlan, 2012; Van Schaak, 2012.
[1346] Antonio Cassese et al. *Cassese's International Criminal Law*, 3rd ed. Oxford: Oxford University Press, 2013, 95.
[1347] Article 7(1)(d), Rome Statute.
[1348] International Criminal Law Database and Commentary; Interview76, 2012.
[1349] International Criminal Law Database and Commentary.

cases.[1350] However, in determining the conduct's criminality, the OTP broadly accepts Ugandan government claims that the conduct occurred to protect the population from the LRA.[1351] Akhavan, for example, describes the IDP camps as "protected villages where the UPDF provides security."[1352] Even if the transfer was forced, it may be permissible under international law.[1353] Cassese et al. cite two required *mens rea* components to determine the behavior's criminality. The first is the intent to forcibly transfer or confine, which the OTP do not appear to contest, though some personnel cited many IDPs' voluntarily transfer.[1354] Some responses were fairly superficial. "It is a very complicated crime to prosecute in the context of a hot war," stated a senior OTP member.[1355] Other OTP members accept the forcible nature but state:

"September 2002. They did the ultimatum for everybody to get into what they called protective camps within a 48-hour period and then afterwards everybody outside of those camps would be considered a rebel, so then tens of thousands were forcefully displaced. But then the complicating factor with that crime is that it can be offset by needs for 'military necessity' and civilian protection. There's two elements that offset the crime, they vindicate it. You have to look at, weigh those factors against the displacement itself."[1356]

One element the prosecution considered was the greater clarity of intent behind the LRA

[1350] Interview76, 2012; Brubacher, 2013; Hood, 2013.
[1351] Interview76, 2012;
[1352] Akhavan 2005, 409.
[1353] International Criminal Law Database and Commentary; ICC Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court,* First session, New York, 3-10 September 2002 (UN publication, Sales No. E.03.V.2 and corrigendum), part II.B. 6.
[1354] Hood, 2013.
[1355] Ibid.
[1356] Brubacher, 2013.

crimes compared to the UPDF's.[1357] In justifying military necessity, the OTP found through "crime analyses that LRA crimes went down quite drastically in the month after September, after that policy [of civilian transfer into IDP camps] had been put in place."[1358] The prosecution noted a 'correlation' between "the call for people to come to the protective centres and their ability to protect people."[1359] This assertion presumes causation of crime reduction by the population's forcible transfer. However, the OTP also concedes, "the LRA figured out how to bypass the security, and the crimes went up." The OTP also concedes that security was not particularly robust, as the UPDF were based "in the middle of the camps, and they used to have to respond to LRA attacks by moving from inside the middle of the camp out to intercept."[1360] Only in 2005, after investigations, did the UPDF begin deploying outside IDP camps with satellite positions around the camps to warn of impending attacks and prompt UPDF interception.[1361]

Under international law, the UPDF must believe the 'transfer' "to be necessary to avoid a harm or evil to himself or to another, and the harm or evil avoided by the act is objectively greater than that sought to be prevented."[1362] Four conditions need to be met in such a circumstance. The first is a present or imminent threat of severe and irreparable harm to life – a threat the LRA clearly poses.[1363] The second is that the crime was the only means to avoid the aforesaid harm, which given the potential for deployment into and around

[1357] Ibid.
[1358] Ibid.
[1359] Ibid.
[1360] Ibid.
[1361] Ibid.
[1362] Cassese et al. 2013, 213.
[1363] Ibid., 214.

towns and villages, is highly contentious.[1364] The third is that the action must not be disproportionate.[1365] Even under circumstances of severe LRA threat, forcible transfer and confinement of hundreds of thousands of Acholi, into camps where the US government acknowledges the UPDF failed to protect them,[1366] does not constitute proportionality. Finally, the action 'must not have been voluntarily brought about by the perpetrator himself',[1367] a fact that is clearly not evident in the decision of the Ugandan government to adopt the forcible transfer strategy. In dismissing military necessity, Branch cites the absence of an accompanying UPDF offensive or authentic effort to defeat the LRA, as demonstrating the absence of intent to protect the population through its transfer.[1368] The conduct instead implies a UPDF strategy to use IDPs as a human shield from the LRA. The UPDF transfer or confinement remains criminal under international law after failing to meet three of the four required military necessity elements. The conduct constituted a crime against humanity.

The OTP also had to consider the war crimes of unlawful deportation and transfer and unlawful confinement.[1369] To constitute a war crime the conduct must breach international humanitarian law, and the crime must constitute a war crime under customary international law.[1370] The OTP does not dispute elements of the crime including UPDF transfer and confinement of persons to another location, those persons protection under the Geneva

[1364] Ibid.
[1365] Ibid.
[1366] US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2003*, 25 February 2004; US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2004,* 28 February 2005.
[1367] Cassese et al. 2013, 214.
[1368] Branch 2008, 163.
[1369] Article 8(2)(a)(vii), Rome Statute.
[1370] Cassese et al. 2013, 81.

Conventions, and UPDF awareness of their protected civilian status.[1371] There is also no contention as to the protected status of the confined civilians or the UPDF's knowledge of their protected status or of a situation of armed conflict.[1372] However, the requirement that an *international* armed conflict existed is certainly disputable.[1373] The ICTY characterized the conflict in the former Yugoslavia as:

"both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof."[1374]

The fact that external support existed, particularly from the Sudanese government for the LRA, meets the ICTY threshold of international armed conflict. Another contestation is the link required under international criminal law between the breach and the armed conflict.[1375] This element requires victims to be non-combatants and conduct to be carried out in furtherance of a military objective.[1376] The OTP, the Ugandan government's and Akhavan's narrative presents transfer as being for the purpose of civilian protection.[1377] However, the US acknowledged military objective of facilitating free UPDF movement and operations, and of removing an LRA social base of support,[1378] correlates to the ICTY

[1371] ASP Elements of Crimes 2002, 17; Interview76, 2012.
[1372] Interview76, 2012.
[1373] ICC Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court,* First session, New York, 3-10 September 2002, part II.B, 17.
[1374] *Prosecutor v Tadic,* Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para 72.
[1375] Cassese et al 2013, 77, citing: Musema 259-62 and Akayesu 642-3.
[1376] Cassese et al 2013, 78.
[1377] Brubacher, 2013; Interview76, 2012.
[1378] US Department of State, Bureau of Democracy, Human Rights, and Labor, *Uganda Human Rights Report 2002*, 31 March 2003.

case of expulsion of Bosnian Muslims from an enclave 'under Bosnian Muslim control'.[1379] The criminality of UPDF forcible transfer and confinement as a war crime, therefore, depends on your interpretation of the UPDF objective. The temporary status may also have implications for the crime of unlawful confinement requiring victims to be confined or to continue to be confined, the *actus reus* of which is clearly evident in HRW findings that the UPDF "falls short of providing adequate safety for the displaced people living 'against their will' in camps."[1380] The OTP approach is to interpret the relocation as temporary, despite it having existed for years, and that the temporary status means the conduct was "unrelated to the military objectives that they [UPDF] were trying to achieve."[1381] In explaining this view, an OTP member stated the following:

"The primary objective was to move the civilians and remove them from the territory. That's the goal that you have to establish in Uganda, that the goal of the military or the government was to remove those people from the territory altogether as opposed to a temporary relocation of civilian populations for a particular military objective. Now the problem is they were fighting about it for a long time. So there is more to my question as to whether or not this was proper military objective or whether it was more something done intentionally to punish the civilian population. So we need to find evidence that this was an intentional act of deportation."[1382]

Some interpretations of international humanitarian law provide that forcible transfer must only be temporary, an interpretation that cannot reasonably be made in the UPDF case

[1379] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 69); Branch 2008, 153; Cassese et al. 2013, 95.
[1380] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*, 70.
[1381] Interview76, 2012.
[1382] Ibid.

given its conduct of forcible transfer since 1996.[1383] However, the transfer's temporary nature does not necessarily instruct actor's military or non-military objectives. OTP actors advancing this argument accept that interpretation is subjective. However, they demand strong evidence to support a case:

"If we're not convinced that this is also a prosecutable case, if the evidence doesn't support it or the evidence is very flimsy, you've got to be able to prove beyond reasonable doubt to the court. Obviously I can see that before you investigate you don't know for sure that you have the evidence to convict, and indeed what we're trying to ensure, as you go through the proceedings some charges will fall away or some charges are ultimately tried and are upheld, and we may even get an acquittal. But nonetheless you go into it deciding to choose those cases where you have clear-cut violations and the strongest evidence. In situations such as this, it's very difficult to decide on the evidence available … we're going to be very skeptical until we bring a charge of forced displacement against the governing actor."[1384]

OTP deference to UPDF explanations, despite antithetical expert opinions, leaves the ICC's interpretation with little empirical credibility, particularly when considering the actors that lead the investigation, and those that were excluded. UPDF threats of intimidation, also compromise OTP capacity to obtain evidence, particularly if, as was suggested by some OTP members, OTP personnel leading the investigation had no interest in UPDF incrimination.[1385] OTP demands for 'clear cut' violations and "the strongest

[1383] Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC," *International Review of the Red Cross* 305 (1995), 162-180.
[1384] Interview76, 2012.
[1385] Interview1, 2012.

evidence" impose a high threshold for evidence incriminating the party to the conflict with whom OTP investigators were cooperating.[1386] Adam Branch goes even further asserting humanitarian agency culpability for aiding and abetting forcible transfer and confinement.[1387]

Once it is established that UPDF conduct constituted crimes against humanity and war crimes, the gravity of the crimes is considered. The number of people in IDP camps is particularly grave in scale. In 2002 the number of persons in internally displaced persons camps was 660, 373. That number increased to 1,405,976 in 2003, to 1,609,744 in 2004, and to 1,742,062 in 2005.[1388] The geographical and temporal spread of the crimes cut across districts in the north, was ongoing since 1996, and was occurring with particular intensity during ICC jurisdiction and investigations. The crimes' nature was particularly destructive to vulnerable groups including children and women placed at particular risk of LRA abuse by grossly inadequate or absent protection. Victims also risked UPDF abuse. The manner of commission of the crimes requires consideration of the means employed, the degree of participation, the intent of the crime, their systematicity or planning and elements of particular cruelty.[1389] The systematic, planned, coercive and forceful means employed as well as the impartial interpretations of intent, meet this element. The 'impact' of displacement on the community, including social, economic and environmental damage,

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[1386] ICC investigators have been accompanied by the UPDF divisional commander when seeking witnesses. See Branch 2007, 188.
[1387] Branch 2008.
[1388] Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Uganda: Need to focus on returnees and remaining IDPs in transition to development, A profile of the internal displacement situation* 24 May 2012, 21. It is broadly accepted that by 2005 there were over 1.5 million Ugandans in IDP camps in Northern Uganda. See for example, Allen, 2006, Preface, citing UN Office of the Coordination of Humanitarian Affairs.
[1389] ICC-OTP, "Draft Policy Paper on Preliminary Examinations," 4 October 2010, 14.

as well as civilian vulnerability is perhaps the most alarming.[1390] The devastating impact of forced surrender of capacity to grow food, engage in economic activity, and relinquish social infrastructure of village or town life has been well documented.[1391] Some elements within OTP are dissatisfied with the adoption of the impact criteria elements, due to its vulnerability to diverse interpretation and application.[1392] The ICC Appeals Chamber, leaving discretion with the prosecutor, stated that for the court to reject jurisdiction, "the inception and the consequences of the crime must be negligible".[1393] The prosecutor has requested clarification from States parties to the Rome Statute as to whether he should select the most 'grave and urgent situations based on gravity'.[1394] The imprecision of criteria, allowing discretion to adopt interpretations of UPDF conduct at odds with empirical data facilitated accommodation of political pressure to which the OTP was subject.

The prosecution approach initially attempts to provide explanations of case selection in Uganda that hint towards objective application of law to fact.[1395] Some OTP personnel that advance those arguments retreat from them upon their interrogation. They acknowledge discretion, including in opening situations. However, they also acknowledge that far greater discretion exists in the selection of cases within situations, particularly when more qualitative elements of case selection are considered.[1396]

[1390] Ibid.
[1391] HRW, *Uprooted and forgotten: Human rights abuses in Northern Uganda*; Branch 2008.
[1392] Seils 2009, 59.
[1393] *Prosecutor v. Lubango Dyilo*, July 13, 2006, Case No. ICC-01/04 (Pikis, J., Separate and Partly Dissenting), 40.
[1394] Luis Moreno-Ocampo, Prosecutor of the ICC, Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005, 6.
[1395] Interview76, 2012; Turlan, 2012; Brubacher, 2013; Hood, 2013.
[1396] Interview76, 2012.

5.7 Regional Implications: Ituri

The OTP's 2002 and 2003 investigations in the Northeastern Congolese province of Ituri, have significant implications for Uganda. The OTP released its first indictment of Thomas Lubanga Dyilo, a *Forces Patriotiques pour la Liberation du Congo (FPLC)* commander and *Union des Patriotes Congolais* (UPC) founder, for enlisting, conscripting and using child soldiers.[1397] Lubanga's FPLC and then UPC had been party to a conflict in Ituri in which more than 50,000 people had been killed and over 500,000 displaced within four years.[1398] The UPC, of mainly Hema ethnicity were fighting other Lendu aligned Militia, of which some leaders have also been indicted by the ICC.[1399] Uganda, the Congolese government and Rwanda have manipulated the conflict in Ituri for their own geo-political interests.[1400] The Congolese government holds an interest in ICC investigations in Ituri, rather than North and South Kivu provinces, where the Congolese army is more directly implicated. Ituri investigations also deter Ugandan engagement in the DRC. The UPDF were deployed in Ituri during the period under the ICC's jurisdiction. In conceding that the UPDF had also committed atrocities in Ituri, a Ugandan General, in April 2003, reportedly requested Amnesty for UPDF personnel from local leaders.[1401] Uganda has sought directly

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[1397] *Prosecutor v Thomas Lubnga Dyilo,* ICC Pre-trial Chamber, Warrant of arrest, 10 February 2006, ICC-01/04-01/06, 3-4.
[1398] HRW, *Ituri: Covered in Blood, ethnically targeted violence in northeastern DR of Congo*, July 2003, 15(11), 1.
[1399] Ibid; *Prosecutor v Germain Katanga,* Warrant of arrest for Germain Katanga, Pre-trial Chamber I, 2 July 2007, ICC-01/04-01/07, 4; *Prosecutor v Mathieu Ngudjolo Chui,* Warrant of arrest for Mathieu Ngudjolo Chui, Pre-trial Chamber I, 6 July 2007, ICC-01/04-02/07, 4-5.
[1400] ICG, *Congo: Four priorities for sustainable peace in Ituri*, 13 May 2008, 1.
[1401] HRW, *Ituri: Covered in Blood, ethnically targeted violence in northeastern DR of Congo*, 7.

and indirectly to tie its oil interests, along with access to other resources, such as gold to peace agreements and military advance in Ituri.[1402] HRW found that:

"Uganda provided assistance to many of these [Ituri] groups, often helping to launch, arm, and train them, but its support was erratic and determined by its own interests."[1403]

Uganda and the Congo were cited by the OTP as the "gravest admissible situations under the jurisdiction of the Court."[1404] However, the first OTP case pursued, that of using child soldiers, did not involve the most grave conduct, or the most senior actor, despite OTP attempts to co-opt norm entrepreneurs through expedient explanations of legal expressivism.[1405] A significant opportunity to expand and advance the norm of international crimes prosecution existed in Ituri, were the OTP willing to pursue Ugandan aiding and abetting of armed groups, or to pursue the UPDF for their crimes – the most senior actors. Such an approach would critically advance the justice cascade of case selection independence by pursuing actors involved in designing the court and in establishing jurisdiction, arguably in both Ituri and Uganda.[1406] Instead, OTP elements that sought to employ a 'too scientific' approach were, as in the Ugandan situation, excluded from the investigation and analysis of the case.[1407] As in Uganda, they also sought to ensure those elements were excluded from any potential Pre-Trial Chamber oversight of

[1402] ICG, *Congo: Four priorities for sustainable peace in Ituri*, 17. HRW, *The Curse of Gold: Democratic Republic of Congo*, 2005,110-11.
[1403] HRW, *Ituri: Covered in Blood, ethnically targeted violence in northeastern DR of Congo*, 6.
[1404] ICC-OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006*), 12 September 2006, 6-7.
[1405] See for example Susanna Greijer, "Thematic Prosecutions for Crimes Against Children," in Morten Bergsmo (ed.) *International Sex Crimes as a Criminal Justice Theme*. Oslo: Torkel Opsahl Academic EPublisher, 2012, 137-174.
[1406] One could make the case the Ugandan referral provided the DRC government confidence to also refer the Ituri situation.
[1407] Interview1, 2012.

OTP case selection.[1408] Finally, the OTP, as discussed in section 5.4, advanced the imprecision of accused's seniority it was required to pursue, facilitating pursuit of politically insensitive cases and preserving impunity for those beyond the OTP's political appetite.

Of further significance to pursuit of Ugandan aiding and abetting was the 'obligation' or strength of precedent supporting a critical element of the mode of liability – the *mens rea*. The ICTY, as noted in chapter two, had overturned the requirement that only material support be directed towards an armed group's general war effort.[1409] It demanded the support's specific direction towards the crimes in question.[1410] The ICTY precedent was considered and rejected in the SCSL's Taylor case which found:

"aiding and abetting liability under customary international law is not limited to – direct intent or – purpose."[1411]

Taylor had only been found to have individual criminal responsibility and not to hold effective control over the leadership of the RUF or AFRC.[1412] His control reflects that alleged of the Ugandan government.[1413] Diverse OTP explanations exist for reluctance to pursue powerful regional actors supporting militia in Ituri. One former senior OTP member states:

[1408] *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice regarding the Case, 27 October 2006, ICC-01/04-01/06.

[1409] *Prosecutor v Mile Mrksic et al.*, ICTY Trial Chamber Judgement, 27 September 2007, IT-95-13/1-T, para 126; *Prosecutor v Mile Mrksic et al.,* ICTY Appeals Chamber Judgment, 5 May 2009, IT-95-13/1-A, para 159.

[1410] *Prosecutor v Momcilo Perisic*, ICTY Appeals Chamber Judgment, IT-04-81-A, 29, para 72.

[1411] *Prosecutor v Charles Taylor*, 26 September 2013, SCSL-03-01-A, Judgment, 207.

[1412] *Prosecutor v Charles Taylor,* Judgment*,* 2012, 2466-8.

[1413] HRW, *Ituri: Covered in Blood, ethnically targeted violence in northeastern DR of Congo*, 6-8

“There was a huge effort by the OTP to avoid mentioning the outside help from Rwanda and Uganda. So that’s the first political approach. You try to say it’s only the UPC, the FNI, etc - local militia.”[1414] That member believes senior OTP elements sought to appease threatening states during the Court’s infancy – that the approach was:
“Don’t touch those who are important for the UK and the USA, which are Museveni and Kagame, that’s obvious. That’s not a big secret. So that’s very important. The second part was what can I do in order to avoid Kabila?”[1415]

The OTP approach, avoiding the Congolese leadership, was required to appease the DRC government’s sovereignty cost concerns that delayed referral of the situation.[1416] The OTP required avoiding the mode of liability of ‘aiding and abetting’ in order to establish “a clinically cleaned case.”[1417] Other OTP members attribute case selection inadequacies to incompetence, including an absence of investigation oversight and planning, rather than politics.[1418] Unlike the Ugandan situation of OTP legal justification for case selection, OTP personnel acknowledge Ugandan government aiding and abetting of crimes in Ituri.[1419] One OTP defender of Ugandan case selection concedes that aiding and abetting could be pursued.[1420] OTP inability to obtain evidence, a philosophical preference for ‘command

[1414] Interview1, 2012.
[1415] Ibid.
[1416] Ibid., Akhavan 2005, 405.
[1417] Interview1, 2012.
[1418] Seils, 2011.
[1419] Interview1, 2012; Brubacher, 2013; Interview76, 2012; Turlan, 2012; Seils, 2011.
[1420] Interview76, 2012.

control' culpability, and hints that Ugandan aiding and abetting could still be pursued, constituted the OTP's explanation for neglecting Ugandan actors.[1421]

5.8 Negotiating without the amnesty card

Case selection that seeks to neglect culpable actors constitutes a form of amnesty – a metaphor this section adopts to consider the ongoing compromises of case selection independence during continuing armed conflict. To that end, this section considers the extent to which realist jurisdictional and functional constraints of complementarity are affected by the norm of international crimes prosecution. I consider the degree of primacy complementarity affords domestic proceedings, the independence demanded of those processes, and how those variables interact with fiscal and other pressures.

A critical element of OTP case selection relating to a situation of interest or investigation is that of complementarity. Rome Statute deference to domestic jurisdictions constitutes, along with Security Council controls over jurisdiction, the most compromising element of OTP case selection independence. Complementarity provides sophisticated state actors the amnesty card instrument of manipulated investigations while enjoying the credible commitment benefits of Rome Statute participation free of concern as to OTP case selection. To understand the regulatory capture and compromise of independence that complementarity affords, its technical elements must be considered. Article 17(1)(a)-(c) of the Statute renders a case inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction over the crimes in question. However, inadmissibility is voided

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[1421] Interview76, 2012; Turlan, 2012 referring to ICC-OTP, *The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri*, DRC, ICC-OTP-20030926-37.

if the investigating or prosecuting state is unwilling or unable genuinely to carry out the investigation or prosecution.[1422]

5.8.1 Colombia: Complementarity's low pre-investigation threshold

Given that a determination of 'unable or unwilling genuinely' was never fully explored in Uganda, determining a technical bar requires consideration of other situations. Colombia, where formal OTP investigations have not yet opened, has experienced close scrutiny of domestic proceedings. Colombia's government has exploited the fact that complementarity is not definitely and finally determined at one point in time, allowing for constant gaming and re-gaming of the complementarity threshold. Even if an investigation is opened, complementarity may be revisited several times before a trial's commencement.[1423]

A proactive Colombian government impeded OTP investigations, with US technical support, by establishing a complementarity-compliant domestic regime that still preserves impunity for elites. Colombia accompanied complementarity with Article 124 prevention of OTP war crimes investigations for seven years after Colombia's ratification.[1424] However, for crimes against humanity, which the OTP alleges various parties in Colombia have committed, Article 124 does not apply leaving complementarity as the sole impediment.[1425] The government established the Colombian Justice and Peace Unit which initially refrained from targeting senior actors or using seniority as a case selection

[1422] Rome Statute.
[1423] J Stirgen. *The relationship between the International Criminal Court and National Jurisdictions*. Boston: Martinus Nijhoff Publishers, 2008, 245; *Prosecutor v Kony et al*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05, para 25 ff (26, 28, 52).
[1424] OTP war crimes jurisdiction begins 1 November 2009. ICC-OTP, *Report on Preliminary Examination activities*, 13 December 2011, 14.
[1425] Ibid 15.

criterion, despite public pronouncements it would pursue those most responsible.[1426] US government support has been critical in enabling sophistication sufficient to avoid ICC investigation and pursuit of senior Colombian government suspects. Joint US-Colombian efforts to prevent ICC investigation demonstrate the predominance of functional rather than jurisdictional constraints.[1427] Under the US Justice Reform Program, "The US Department of Justice provided assistance to the Justice and Peace Unit, including training of and technical assistance for prosecutors and investigators, equipment, database development, office and hearing room development, and forensic and operational support."[1428] The Department of Justice spent \$1.54 million in 2006 and \$2.58 million in 2007.[1429] Simultaneously, the US government provides enormous military support to the Colombian government to fight armed opposition. Secret US assistance, including substantial National Security Agency eavesdropping, is funded through a multibillion-dollar black budget. The secret support is, since 2000, supplemented by a public \$9 billion package of mostly military aid called Plan Colombia.[1430] This support implicates US actors for aiding and abetting what the OTP has reasonable basis to believe are crimes against humanity.[1431] Therefore, OTP investigations in Colombia would likely procure US policy revision to ICC opposition so forceful the institution would struggle to survive, let alone function. The ICC's Colombian threat to US interests dramatically heightens US engagement in softening OTP case selection independence.

1426 Saffon 2009, 99; ICC-OTP, *Report on Preliminary Examination Activities*, November 2013, 32.
1427 Goldstein et al. 2000.
1428 Committee on Foreign Affairs, House of Representatives, Subcommittee on the Western Hemisphere, Serial 110-39, 24 April 2007, Washington: U.S. Government Printing Office, 116.
1429 Ibid.
1430 Dana Priest. "Covert action in Colombia," *Washington Post*, 21 December 2013.
1431 ICC-OTP, *Report on Preliminary Examination Activities*, November 2013, 32.

The Colombian government has sought to establish and refine complementarity compliance and political utility through its 2005 Justice and Peace Law (JPL). The German government commissioned scholar, Kai Ambos to study the law's compliance.[1432] The JPL covers crimes by both left and right leaning armed groups after 25 July 2005.[1433] The OTP has found that the Colombian armed forces, government-aligned paramilitary groups, and left wing armed groups committed crimes against humanity and war crimes since 1 November 2009.[1434] Ambos found that the law, in conjunction with a 2006 Decree and Constitutional Court support, converts ordinary sentences to alternative five-year minimum and eight-year maximum sentences.[1435] The 'considerable' mitigation is contingent upon accused participation in 'truth, justice and reparation.'[1436] Ambos also found that the law satisfied the Article 17(1)(d) requirement of 'some' state action greater than full criminal exemption, since punishment remained through considerable sentence reduction.[1437] While Ambos acknowledges Supreme Court pressure to investigate state security forces, he also cites the discriminatory exclusion of FARC and other left-wing groups from sentence conversion due to drug trafficking or illicit enrichment.[1438] Ambos notes the special Justice and Peace Chamber's filtering of eligible cases based on demobilization and rejection of criminality, before the executive, a party to the conflict, wields final discretion to directly

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[1432] Kai Ambos and Huber Florian, *"The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?",* Extended version of the Statement in the "Thematic session: Colombia", ICC-OTP NGO Roundtable, 19-20 October 2010, The Hague, Göttingen, Germany, 5 January 2011.
[1433] Kai Ambos, "The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity," in Carsten Stahn and Mohamed El Zeidy (eds.) *The International Criminal Court and Complementarity: From Theory to Practice.* New York: Cambridge University Press, 2011, 1071-1096, 1072-3.
[1434] Ambos and Florian 2011, 30-1
[1435] Ambos 2011, 1072.
[1436] P. Kalmanovitz, "A law of conditionally reduced penalty," in M. Bergsmo and P. Kalmanovitz (eds.) *Law and Peace Negotiations.* FICHL Publication Series, ,2009, 7, 15.
[1437] Ambos and Florian 2011, 4-5.
[1438] Ambos and Florian 2011, 5; Ambos 2011, 1073.

impede commutation of sentence.[1439] Once the individual is approved, the government prosecution ascertains criminal responsibility and the authenticity of the provided testimony before a hearing is held to determine sentence.[1440] An OTP member described Colombia's complementarity approach, which facilitates executive assistance and discriminatory justice as "very sophisticated."[1441]

The sophistication can be seen in Ambos' observations that while amnesty impedes prosecution or investigation, a pardon constitutes post-trial exemption unlikely to be interpreted as shielding criminal responsibility through inaction.[1442] Ambos also considers the elements of 'unwillingness' including shielding, unjustified delay, and lack of independence and impartiality – elements to be considered cumulatively, not individually in determining unwillingness.[1443] Unwillingness, Ambos asserts, is determined by the underlying bad faith expressed in the actions or omissions of the national justice system. That interpretation provides broad OTP discretion to determine a 'bad faith' departure from 'genuine' proceedings. Ambos, determines that a five-to-eight-year sentence does not constitute shielding and that rendering of only one judgment after four years does not constitute unjustified delay.[1444] He views the Colombian judiciary as adequately independent of 'direct' executive influence, suggesting indirect influence is acceptable.[1445]

[1439] Ambos 2011, 1073-5
[1440] Ibid., 1076-8.
[1441] Interview76,,2012.
[1442] Ambos 2011, 1087.
[1443] Ibid., 1089.
[1444] Ibid., 1090-1.
[1445] Ibid., 1092.

Ambos also recognizes the very low threshold of ‘unable’, which requires total collapse, a substantial collapse, or the unavailability of the national judicial system, including inability to obtain the accused, necessary evidence or testimony, or otherwise to carry out it’s proceedings.[1446] Perceived political interference in efforts to obtain accused, evidence, or testimony, without making value judgments about a justice system’s function, Ambos asserts, may constitute inability.[1447] This threshold is particularly low in that it excludes economic and other pressures on domestic courts’ capacity to conform to international law and mitigate the interests of government actors.[1448] In justifying this weak ‘unavailability’ threshold Ambos cites the Statute use of ‘substantial’ instead of ‘partial’ (collapse) as requiring an external observer to make quantitative, easily verifiable determinations, of substantial legal or factual obstacles without engaging value (quality) judgments about a justice system’s functioning.[1449] Thus, a poorly functioning and qualitatively corrupt national justice system may still meet Ambos’s complementarity threshold as long as the system is not, for example, quantifiably over-burdened, or under-capacitated.[1450] Colombia’s Constitutional Court, in requiring a “clear absence of necessary objective conditions to carry out proceedings” adopts Ambos’s position.[1451]

[1446] Ibid.; Rome Statue.
[1447] Ambos 2011, 1093.
[1448] Wolfgang Friedmann. *The Changing Structure of International Law.* London: Stevens & Sons, 1964, 146-147; Eyal Benvenisti, “Judicial Misgivings Regarding the Application of International law: An Analysis of Attitudes of National Courts,” *European Journal of International Law* 4 (1993), 159-183; Jan Paulson. *Denial of Justice in International Law*. Cambridge: Cambridge University Press, 2005, 4; André Nollkaemper, “The Independence of the Domestic Judiciary in International Law,” *The Finnish Yearbook of International Law* 17 (2006), 261-305.
[1449] Ambos and Florian, 2011, 6-7.
[1450] Ibid., 7.
[1451] Ibid.

The OTP also determined, most importantly, that subject to appropriate sentencing, those bearing greatest responsibility have already been subject to national proceedings in Colombia.[1452] By initiating 'proceedings' of ambiguous voracity and despite convicting only eleven persons after sevens years of operation, Colombia's efforts continue to satisfy OTP standards.[1453] The OTP's conclusions appear to correctly apply very weak imprecise law that severely constrains the extent to which states have delegated international crimes prosecution. The very top of the Colombian elite has been commonly cited as involved in the conflict's crimes.[1454] However, the International Centre for Transitional Justice (ICTJ) found that Colombia's prosecution focused on illegal armed groups and low and mid-level combatants rather than political, military and business leaders that aid and abet, or wield command control over state security forces.[1455]

The ease with which complementarity was satisfied emboldened the Colombian government. In 2012 it passed the 'Legal Framework for Peace' (LFP) as the basis for peace talks. The LFP, approved by the Constitutional Court, provides for suspension of sentences, allowing no incarceration for those convicted.[1456] The OTP, in attempting to accommodate the Colombian government, stated it would approach reduced and suspended sentences on a case-by-case basis considering whether, in the circumstances, sentences are

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[1452] ICC-OTP, *Situation in Colombia - Interim Report*, November 2012, 50.
[1453] ICC-OTP, *Report on Preliminary Examination activities*, 13 December 2011, 16-7; International Centre for Transitional Justice, *Justice and Peace: Progress and Great Challenges*, 10 May 2012.
[1454] An example is the use of death squads by former President Alvaro Uribe's brother alleged by a former police officer that states he was paid to turn a blind eye. See: Associated Press report, 'Retired Colombian police officer accuses Uribe's brother of leading a 1990s death squad,' *Fox News*, 24 May 2010.
[1455] ICTJ, *Justice and Peace: Progress and Great Challenges*,
[1456] Helen Murphy. "Colombia's high court rules FARC peace talks law constitutional," *Reuters,* 29 August 2013.

"consistent with an intent to bring the person concerned to justice."[1457] However, in a leaked private letter to Colombia's Constitutional Court,[1458] prosecutor Fatou Bensouda signals commutation or suspension of sentence would impede complementarity:

"the duration of the term of imprisonment may be a relevant factor in cases where the penalty is so disproportionate that the intent to bring the person concerned to justice can be questioned. For example, the Informal expert paper *The principle of complementarity in practice*, advanced by the Office of the Prosecutor, considered that "amnesties, pardons, or grossly inadequate sentences issued after the proceeding, in a manner that brings into question the genuineness of the proceedings as a whole" can be indicators of "shielding" or "intent" … Since the suspension of a prison sentence means that the accused does not spend time incarcerated, I would like to warn you that this would be manifestly inadequate for individuals allegedly bearing the greatest responsibility for the commission of war crimes and crimes against humanity."[1459]

Another leaked letter also insisted those 'most responsible' be pursued although the LFP appears to accommodates this demand.[1460] However, in a repudiation of the OTP warning, Colombia's Constitutional Court approved the LFP, but allowed scope for agreement via rejection only of total suspension. The prosecution responded with further accommodation in its 2013 report, citing the Constitutional Court's exclusion of total suspension of

[1457] ICC-OTP, *Situation in Colombia - Interim Report*, November 2012, 64.
[1458] Rodrigo Uprimny. "Cartas Bombas," *El Espectador*, 24 August 2013; "Una 'carta bomba'", *Semana.*
[1459] Translated letter dated 25 July 2013, from the Prosecutor, ICC-OTP, to the Government of Colombia, received 28 October 2013 via email from the translating author, an NGO worker.
[1460] Una 'carta bomba'", *Semana*.

sentence for those most responsible.[1461] The ICC's position suggests that anything less than a 'total' suspension of sentence would demonstrate sufficient Colombian commitment to compatibility with complementarity. The ICC position remains ambiguous as to whether, for example, a week of incarceration would be acceptable for those Colombian's most responsible for core international crimes.

5.8.2 Post-investigation contestation: Raising the Bar

While the complementarity threshold is very low for situations prior to the initiation of an investigation, the bar is significantly raised once the prosecution initiates investigations. The Rome Statute requires domestic proceedings cover the same 'case' as that before the court. It also requires that states are able and willing genuinely to carry out proceedings.[1462] The Appeals Chamber, citing Jo Stigen's requirement of an examination of some detail reflecting a sufficient measure of thoroughness, including:

"steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[1463]

[1461] ICC-OTP, *Report on Preliminary Examination Activities*, November 2013, 32.

[1462] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Situation in Libya, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11.

[1463] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Situation in the Republic of Kenya, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" 30 August 2011, ICC-01/09-02/11 OA, 23, 15, citing; Joe Stigen. *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*. Leiden: Martinus Nijhoff Publishers, 2008, 203.

The burden of proving those steps are taken falls to the State – requiring "evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case."[1464] The PTC found that Kenyan government 'assertions' that ICC indictees were being investigated were of insufficient specificity and probative value to discharge the burden of proof.[1465] However, the specific reference in Article 17(3) to inability 'to obtain the accused, or the necessary evidence and testimony', or otherwise to 'carry out proceedings' specifies that in order to meet the complementarity threshold, a criminal justice process, must enjoy the investigative capacity to obtain evidence and to retain testimony from witnesses. The OTP demanded witness protection capacity of the Kenyan government in 2009 discussions regarding complementarity.[1466] The PTC, in the Saif Gaddafi case, also expressed concern about the inability of judicial and governmental authorities to ascertain control, access witness testimony and provide adequate witness protection.[1467] The PTC cites elements absent from consideration in Colombia, such as governmental failure to protect detained former regime members from torture and mistreatment.[1468] The Court lowers the bar considerably when determining State ability to investigate and prosecute "in the context of the relevant national system and procedures," meaning "in accordance with the substantive and procedural law applicable" in that

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[1464] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* Situation in the Republic of Kenya, Judgment on the appeal of the Republic of Kenya against the decision of PTC II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" 30 August 2011, ICC-01/09-02/11 OA, 23.
[1465] Ibid., 32-3.
[1466] ICC, Agreed minutes of meeting of 3 July 2009 between the ICC prosecutor and the delegation of the Kenyan government. OTP, press release.
[1467] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, *Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, 31 May 2013, ICC-01/11-01/11, 86, para 209.
[1468] Ibid.

State.[1469] Libyan law and procedure provide for protective measures. However, the Libyan government was unable to exercise control over detention facilities, or even access, let alone protect, witnesses.[1470] Further, the PTC appears to require independent witness protection enjoying practical capacity and independence to cater to defence and prosecution witnesses.[1471] It also required that the defendant be provided counsel, but remained ambiguous as to the accused's right to counsel during interrogation, given the right's absence from the Libyan Code of Criminal Procedure.[1472]

The ICC appeared to reconsider the bar set in the Saif al Islam Gaddafi case. In the Abdullah Al-Senussi case, the Libyan government, by providing material evidence of a difficult yet on-going investigation, secured an inadmissibility finding.[1473] Despite the abduction of an accused's counsel, the failure at the time of judgment to provide legal representation to an accused, unavailable witness protection capacity, the situation in Libya did not, "… necessarily entail "collapse" or "unavailability" of the Libyan judicial system such that it impeded Libya's ability to carry out the proceedings"[1474]

The key discrepancy between the Gaddafi and Al Senussi cases, other than a demonstrated investigation, appeared to be the fact that Al Senussi was in the hands of the government. Sceptical commentary of the decision cites Senussi's potential disclosure before the ICC of security details between Gaddafi, the CIA and MI6 as potentially motivating ICC

1469 Ibid., 82, para 200.
1470 Ibid., 83, para 21.
1471 Ibid., 87, para 211.
1472 Ibid., 88, para 214.
1473 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Situation in Libya, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11.
1474 Ibid., 139.

apprehension about hosting the trial.[1475] Robert Fisk observes “when lawyers for Senussi demanded to know if MI6 operatives had interrogated him during his stay in Mauritania – and before his illegal rendition to Libya – Foreign Secretary William Hague declined to reply.”[1476] By the time of the PTC judgment, British ally Silvia Alejandra Fernández de Gurmendi held the position of Presiding PTC Judge, bringing into question the PTC’s independence, and the effect on case selection independence.

Unlike the Kenyan government, the Libyan government bore no political risk of self-incrimination through providing sufficient evidence to demonstrate pursuit of the same persons and conduct. By refraining from providing genuine and potentially incriminating information, Kenya failed to demonstrate concrete and progressive steps to address the same case as the individuals and conduct before the ICC.[1477] Kenya and Colombia are similar in that neither governments nor the Security Council referred the situations, yet the OTP treated them differently. A former senior OTP member viewed Colombia as “a situation that should have been engaged” where “the Court did not provide an effective threat” and was not consistent.[1478] The member noted:

“One staff member noted the difference in approaches between Colombia and Kenya. The Prosecutor had made it clear he wanted to assist and cooperate in Colombia rather than apply pressure to see results at the national level. The opposite approach was taken in Kenya.”[1479]

[1475] Robert Fisk. ‘Is The Hague making a mockery of justice so the CIA and M16 can save face?’ *The Independent*, 31 October 2013.
[1476] Ibid.
[1477] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Situation in Libya, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11, 11 October 2013, 88.
[1478] Seils, 2011.
[1479] Ibid.

The OTP experienced exaggerated pressure to initiate Kenyan investigations after UN Secretary General, Kofi Annan, employed his significant agency as a norm entrepreneur by providing a list of names and accompanying evidence to the OTP. The Kenyan Judge that investigated the abuses had requested Annan provide the information if Kenyan complementarity efforts were not forthcoming. While the OTP still retained discretion, it constrained itself by providing a number of deadlines for the Kenyan government to initiate "genuine judicial proceedings against those most responsible."[1480] Kenya's failure to meet these deadlines, after parliamentary refusal to approve a special tribunal, indicated parliaments disagreement with the executive as to the political cost of delegating authority, and, caused OTP investigations and indictments. The power dynamics shifted considerably when accused members of parliament, took control of the executive in April 2013. Other governments' token steps illuminate Kenya's complementarity failure to prevent OTP investigations. Guinea, for example, sought to assert absence of culpability by hiring former SCSL Prosecutor, David Crane, and SCSL investigator, Alan White to assess its culpability. The 'Crane report', in alignment with the then Guinean military view, attributes responsibility for 2009 killings to a specific army unit, excluding Guinean junta culpability.[1481] The report, which contradicted UN findings, was found not to be credible by the ICTJ.[1482] The Guinean government then adopted incremental, but not self-incriminating domestic processes sufficient to satisfy the OTP.[1483]

[1480] Mahony 2010, 132.
[1481] "Guinea Conakry: stadium killings inquiry not credible," *Radio Netherlands Worldwide*, 4 March 2010.
[1482] Ibid.
[1483] ICC-OTP, *Report on Preliminary Examination Activities*, November 2013, 42-45.

5.8.3 Complementarity in Uganda

Uganda has set itself up to employ complementarity, if required. What distinguishes Uganda from Kenya is that Museveni's OTP engagement was calculated to initiate a domestic process signalling intent to prosecute crimes itself while stigmatizing and isolating the LRA with ICC indictments. Ugandan engagement placated OTP inclination to investigate UPDF crimes before triggering jurisdiction. Although gravity and a disingenuous interpretation of forced displacement had already extinguished OTP jurisdiction over UPDF crimes, the Ugandan government had also provided evidence of domestic UPDF investigations.[1484] Because Ugandan engagement prevented OTP investigation of UPDF crimes, Uganda avoided the heightened obligation to investigate the 'same cases'.

The Ugandan government's complementarity calculation is reflected in the views of its consultant, Payam Akhavan. Akhavan, citing the US State Department, concludes that Uganda's justice system is "recognized for its independence and … has not collapsed."[1485] President Museveni, shortly after he referred the Ugandan situation, suggested the Ugandan government would prosecute crimes committed by the UPDF.[1486] This assertion signaled to the OTP that Uganda would employ the primacy afforded it by complementarity if the OTP pursued UPDF crimes. The sovereignty cost of fully implementing domestic complementarity is apparent in previous politically sensitive Ugandan prosecutions. Museveni has previously experienced pressure to prosecute

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[1484] Interview29, 2012.
[1485] Ibid, 415. While the US is an ally of President Museveni's, it should be noted that State Department Human Rights Reports do incriminate the UPDF.
[1486] Ibid, 411.

corruption involving ministers, family members and elements within the UPDF. In the case of fictional UPDF soldiers drawing salaries, Museveni used politicized military prosecution to purge UPDF elements viewed as opponents, rather than pursue those most culpable.[1487] A low 'willingness' complementarity threshold, as established in the Libyan and Colombian cases, allows politicized prosecutions. This lever of case selection control constitutes the most powerful government instrument after explicit jurisdictional exclusion – a lever unavailable to the governments of Rwanda or Sierra Leone. The normative power of complementarity was diminished by the acceptance of Ugandan self-referral despite Uganda ostensibly being willing and able genuinely to prosecute crimes.

OTP personnel inconsistently cite complementarity as further justification for avoiding UPDF indictments. Some OTP personnel cited gravity as the sole determinant.[1488] However, other OTP members, as well as Ugandan government personnel, viewed Ugandan processes at the time of investigation as satisfying complementarity.[1489] The OTP compiled a complementarity assessment of the military court system, including a detailed report of the number of prosecutions comparative to the number of crimes, the processes' quality, and draft legislation enabling prosecution of Rome Statute crimes.[1490] The assessment, which has not been made public, drew on information from the public prosecutors office, the Human Rights Commission, human rights organisations, and a

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1487 Mahony 2010, 143.
1488 Brubacher, 2013; Interview76, 2012.
1489 Hood, 2013.
1490 Brubacher, 2013; Duncan Laki Muhumuza, Ugandan Mission to the United Nations, 5 November 2012, New York, USA interview n°90; Barney Afako, "Country Study V: Uganda," in Max du Plessis and Jolyon Ford (eds.) *Unable or unwilling? Case studies on domestic implementation of the ICC Statute in selected countries*. Pretoria: Institute for Security Studies, 2008, 93.

British government white paper on the UPDF.[1491] Where elements of compliance were questionable, the OTP was willing to assist, including with Human Rights Commission complaints and process effectiveness.[1492] However, complementarity considerations ceased, along with engagement, once it was determined that UPDF cases would not be pursued due to insufficient gravity.[1493] While civil society observers do not commonly view current or former processes as authentic, independent or capable of holding those most responsible accountable, Uganda's meager efforts likely met the low complementarity threshold.[1494]

OTP gravity determinations excluding UPDF crimes diminished complementarity's compliance pull considerably. However, complementarity considerations may re-emerge were the Ugandan government to apprehend LRA accused and decide to try them domestically, extinguishing sovereignty costs. Domestic trials would diminish external pressure for accompanying ICC prosecution of UPDF cases.[1495] Similarly, controlled domestic trials can avoid unforeseen consequences, including subpoenas of government personnel to testify to politically sensitive issues.[1496] In 2004, the government, with US assistance, drafted an International Criminal Court Bill, which was finally passed in 2010.[1497] The ICC Act provided Uganda requisite domestic jurisdiction over international

[1491] Brubacher, 2013.
[1492] Hood, 2013; Brubacher, 2013.
[1493] Brubacher, 2013.
[1494] Interview Nicole Zarifis, Justice Law and Order Sector Foreign Advisor, 18 November 2012, Kampala, Uganda interview n°10; Clark, 2013; Adam Branch, Academic, Makere University, 14 November 2012, Kampala, Uganda interview n°40; Lyandro Komakech, Refugee Law Project, 16 November 2012, Kampala, Uganda, interview n°62
[1495] Interview93, 2012; Branch, 2012; Clark, 2013.
[1496] Komakech, 2012.
[1497] Afako 2008, 93; Michael Ronning, USAID, 16 November 2012, Kampala, Uganda, interview n°94; International Criminal Court Act, 2010 (Act 11 of 2010), Uganda Gazette no 39 Vol. CIII, 25 June 2010.

crimes and modes of responsibility for the International Crimes Division (ICD) of Uganda's High Court to hear the cases.[1498] Norm entrepreneurs have protested a combination of constraints including the Court's hearing of only a single LRA case, an absence of political will to try UPDF cases, and poor donor support.[1499] Norm entrepreneurs also cite the pre-existence of the Amnesty Act, providing amnesty for surrendering rebels who renounce and abandon war or armed rebellion.[1500] The Act, which contravenes ICD jurisdiction, provides the Minister of Internal Affairs discretion to propose a list of names to Parliament for amnesty approval.[1501] In the ICD's sole case of LRA commander, Thomas Kowelo, the Constitutional Court upheld Amnesty, ordered the Amnesty Commission and the Director of Public Prosecutions (DPP) to grant Kowelo a certificate of amnesty, and cease his trial.[1502] All this appears to require for complementarity compliance is for commutation of sentence to be used, as in Colombia, instead of amnesty. Norm entrepreneurs, cite enormous demands for 'credible justice' without addressing the technical complementarity threshold. HRW's ICD examination found that:

"For the ICD to render credible justice, including addressing crimes committed by both the LRA and Ugandan army and overcoming the legal obstacles, the Ugandan government will have to provide uncompromised political support. Donors also have a critical role to play, including by funding key needs for the ICD and stressing the importance of accountability

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[1498] Sections 7-9, 11, ICC Act, 2010; High Court of Uganda International Crimes Division Practice Directions, Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

[1499] Interview Branch, 2012; Clark, 2013; Zarifis, 2012; Van Schaak, 2012; Komakech, 2012; HRW, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, 2012.

[1500] Ibid.; Section 3(1), Amnesty Act, Chapter 294, January 21 2000.

[1501] Section 2, Amnesty Act 2000;HRW, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division,* 5.

[1502] *Thomas Kwoyelo Alias Latoni v Uganda,* Constitutional Petition no 036/11, [Arising out of HCT-00-1CD-Csae no 02/10], 22 September 2011, 26.

for crimes committed by both sides.“[1503]

A group of donors to Ugandan justice sector reform, the Justice Law and Order Sector (JLOS) makes more modest complementarity-oriented ICD demands of significant revision, particularly capacity to deliver prison terms.[1504] JLOS actors, particularly in the context of a scaling down of ICD capacity,[1505] are not optimistic about future ICD independence.[1506] Early US enthusiasm for domestic processes diminished over time, as ICC pursuit of UPDF crimes diminished.[1507] In May 2013, with US government support, Uganda re-instated Amnesty provisions for LRA combatants.[1508]

5.8.4 An OTP environment prohibiting reconsideration of UPDF cases

The Ugandan government feels under insufficient pressure to use commutation of sentence rather than amnesty, despite it achieving the same goal. This subsection considers key sources of pressure on the OTP that constrain its case selection independence, thereby diminishing pressure on the Ugandan government. The sources of pressure include, fiscal constraints, the threat of state non-cooperation, the establishment of alternative justice institutions, and accusations that OTP case selection discriminates against Africans. These instruments advance a realist State objective that further control case selection independence – the closure of situations, of which Uganda may be the first. In this

[1503] HRW, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, 2.
[1504] Interview10, 2012.
[1505] Interview10, 2012; Justice Dan Kiiza, International Crimes Division (ICD), High Court of Uganda, 15 November 2012, Kampala; Interview Joanne Kagezi, ICD Prosecutor, 19 November 2012, Kampala, Uganda, interview n°53.
[1506] Interview10, 2012.
[1507] Officer, US Embassy, 16 November 2012, Kampala, Uganda, interview n°41; Member, USAID, 16 November 2012, Kampala, Uganda, interview n°94; Kiiza, 2012.
[1508] Interview41, 2012; Uganda Gazette, Amnesty Act (Revocation of Statutory Instrument No. 34 of 2012) Instrument 2013, 24 May 2013.

environment norm entrepreneurs have diminished effect on case selection independence.

The first instrument to consider is budgetary constraint. The OTP, in attempting to project efficiency, refrained from mentioning budget during its early years.[1509] However, budgetary restraints have started to take effect as caseloads increase without proportionate budgetary expansion.[1510] OTP personnel assert that case selection will still prioritize those most grave cases despite the prosecutor's statements, since 2011, that case selection is contingent on budgetary expansion.[1511] Budgetary pressure is exacerbated by state pressure to engage other incidents or situations including in the DRC, Darfur and Myanmar.[1512] Constrained budgets would have exaggerated effects where the OTP seeks to gather evidence in relation to the UPDF or any other party to a conflict that triggered ICC jurisdiction, particularly in the situation of a state self-referral. An attempt to investigate UPDF crimes in Uganda, without a global power providing information, renders the ICC particularly vulnerable to cooperative impediments affecting its capacity. Unlike the situations in Darfur or Libya where Security Council powers provide evidential support, State referrals from western allies leave the OTP in its weakest position to acquire evidence. An under-capacitated court exaggerates the problem of acquiring incriminating evidence in a case such as that involving Ugandan support of militia in Ituri.[1513] Budgetary constraints, therefore, constitute an entrenchment of institutional capture and a statist safeguard against entrepreneur-like OTP behavior.

[1509] Interview76, 2012.
[1510] Ibid., Turlan, 2012; Balteanu, 2012.
[1511] Interview76, 2012; Turlan, 2012; ICC-OTP, *Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011),* 2 November 2011, 5.
[1512] Interview76, 2012; Turlan, 2012; Nzau Musau. 'Kenya: ICC Threatens to Drop Cases for Lack of Funds,' *The Star*, 31 July 2013.
[1513] Turlan, 2012. .

Budgetary constraint can also trigger resource reallocation, diminishing the chance of case selection reconsideration in a given situation.[1514] The OTP has come under pressure to reallocate Ugandan resources, increasing the possibility of situation exit, and Ugandan abandonment of an ostensibly reassuring complementarity system without consequence.[1515] Financial pressure is particularly useful for global powers best positioned to provide evidence incriminating adversaries or complementarity support to protect allies.[1516] In 2012 the UK and Germany successfully sought to cut the ICC's budget, increasing OTP dependence on state cooperation.[1517] To this end, American ICC policy has evolved to prefer domestic venues for dealing with crimes, and where they fail, mixed international/domestic processes like the SCSL, leaving solely international processes as the last resort.[1518] To that extent, the US policy generally reflects a theme the ICC itself increasingly seeks to emphasize – that the ICC is a court of 'last resort'.[1519] Increasing space for powerful state influence appears to be opened by budgetary pressures. The ICC's reduced 2013 budget prompted consideration of Security Council funding, US government funding, or voluntary contributions for Security Council referred situations.[1520]

Budgetary constraints exaggerated and have been exaggerated by cooperative leverage. The reluctance of western powers to provide intelligence incriminating Museveni, Saleh or

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[1514] Balteneau, 2012.
[1515] Ibid.
[1516] Ibid.
[1517] ASP, Eleventh Session, The Hague, 14-22 November 2012, Official Records Vol. 1,13; The Greens/EFA party, "10th anniversary of ICC, Budget cuts send wrong signal," 13 November 2012.
[1518] Former State Department Officer, 20 November 2012, via phone, interview n°17.
[1519] Tiina Intelmann. 'International Criminal Court – African Union,' *New Business Ethiopia*, 11 October 2013.
[1520] Interview76, 2012.

other actors in international crimes in Uganda or the DRC is instructive to OTP inability to proceed with such cases. The AU pressure provides an even greater deterrent to OTP pursuit of Ugandan government officials. Goldstein et al.'s realist explanation of codified international institutions asserts that dominant powers bind weak members and enforce rules only where they are able to bear the enforcement costs.[1521] Western powers' shaping of ICC case selection away from allies such as Museveni, Kagame, Kabila, Boizize, Ouattara, and their regimes, and towards adversaries, including the Sudanese and Libyan leadership, reinforces Goldstein et al's theory.[1522] However, the ICC also redistributes jurisdiction-triggering power from the Security Council to States Parties. African governments' enthusiastic embrace in referring situations to direct the OTP against adversaries has been tempered by Security Council direction of the ICC against African leaders. Similarly, African leaders also bear antagonism towards OTP and Kofi Annan's triggering of the Kenyan situation.

African leaders clothe their attempts at case selection control in anti-colonial rhetoric that resonates amongst domestic constituencies by casting the ICC as racist.[1523] This 'interest-based' strategy intertwines the norm of ICC case selection with the realist interest of protecting African governments and encroaching upon Security Council case selection control.[1524] That strategy promotes self-referred situations, controlled through state cooperation, as the only cases the Court should pursue.[1525] The AU backlash, employing a number of instruments, constitutes a weak state challenge to powerful state interests

[1521] Goldstein et al. 2000.
[1522] Interview93, 2012.
[1523] Ibid.; Nicholas Kurlish and Marlise Simons. "Setbacks Rise in Prosecuting the President of Kenya," *New York Times*, 19 July 2013; Justine Boulo. "Ramtane Lamamra : La CPI ignore la souveraineté de nos pays," *Jeune Afrique,* 10 November 2013.
[1524] Abbott and Snidal 2000.
[1525] Interview93, 2012.

reflecting powerful states' greater interest in excluding jurisdiction over aggression than in retaining sole jurisdiction-triggering discretion. The AU has requested UN Security Council deferral of proceedings against the Kenyan and Sudanese leadership and passed resolutions refusing to cooperate after the Security Council refused to comply.[1526] The AU will also provide African governments an extra complementarity filter by endowing the African Court of Human and People's Rights (ACHPR) with jurisdiction to try international crimes. The AU also diminished normative pressure to support OTP case selection by refusing to endorse the new prosecutor's candidacy in 2011.[1527] Finally, under Kenyan and Sudanese pressure, the AU threatened mass ICC withdrawal, a measure that would cripple the institution but jeopardize the utility of self-referred situations, including Uganda.[1528] Instead the AU reaffirmed non-cooperation on cases against the Kenyan and Sudanese leadership. The AU resolution endorsed Kenya's ICC cooperation and expressed concern as to politicized ICC indictments against African leaders, particularly in Kenya. It stressed Kenya's anti- terror leadership, the gravity of indicting Kenyan leaders, the indictments' threat to state sovereignty, and the principle of immunities for senior state officials.[1529] Most importantly, the AU decided that no charges shall be commenced or continued against any person acting or entitled to act as Head of State, and called for ICC suspension of the Kenyan leadership cases.[1530] The AU also established a Security Council contact group to sensitize the Security Council to AU concerns about case selection.

[1526] Rick Gladstone. "African Call to Delay Kenyans Trials Fails at U.N." *New York Times*, 15 November 2013; AU, Decision on the Meeting of African States Parties to the Rome Statute, Assembly/AU/Dec.245(XIII), Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, 2.
[1527] Member, US Mission to the UN, 2 November 2012, New York, USA, interview n°37
[1528] Africa Confidential "Kenyatta mulls nuclear option," Vol. 54 (21), 18 October 2013.
[1529] AU, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1, October 2013, 1-2.
[1530] Ibid., 2.

Arguably the AU's most confrontational step is to request Rome Statute amendments leading to Chamber discretion to allow cases be heard in another State, to allow accused to appear via video link, and to excuse accused from attending trial.[1531] In a sign of the continuing normative power of international crimes prosecution, Kenyan government attempts to revoke the Prosecution's *proprio motu* power was unsuccessful.[1532] The request that states advise and consult the AU before referring situations demonstrates the invigorated collaborative and systematic approach of AU states towards preventing even inadvertent ICC indictment of African leaders.[1533]

The pressure upon the ICC from the AU, Kenya, Sudan and others makes OTP inclination to reconsider UPDF investigations ever more remote, particularly given China's recent expression of support for AU positions.[1534] Observing and supporting contestations from the periphery also informs the utility of methods available to Museveni were OTP confrontation to occur. Kenyan efforts are particularly instructive. Kenya's Parliament has voted to leave the ICC, it has withheld evidence and witness protection cooperation, and it threatened to cease regional terrorism cooperation with the US and other western governments.[1535] It also sought to have ICC cases transferred to the East African Court of Justice. In a critical indication of the normative power of international crimes prosecution,

[1531] ICC, Assembly of States Parties, Resolution ICC-ASP/12/Res.7, Adopted at the 12th plenary meeting, 27 November 2013, 1,3-4.
[1532] Standard Media, "Revoke power of International Criminal Court Prosecutor to initiate investigations," 12 November 2013.
[1533] AU, Decision on Africa's relationship with the ICC, 3.
[1534] Statement by Mr. Ma Xinmin, Counsellor of the Department of Treaty and Law of Ministry of Foreign Affairs of the People's Republic of China, At the Twelfth Session of the Assembly of States Parties To Rome Statute, The Hague, November 2013.
[1535] Nicholas Kulish. "Kenyan Lawmakers Vote to Leave International Court." *New York Times*, 5 September 2013; Citizen News "The International Criminal Court (ICC) has directed the government to officially respond to claims by the Prosecution that it is not co-operating with the court" 10 December 2013.

western states, facing increasing competition to access Kenya's natural resources and growing economy, have adopted passive positions or have indicated support for Kenya in the face of civil society protestation.[1536] Like Kenya, Museveni has sought to diversify his economic patronage by engaging China.[1537] In the end it was the 'unprecedented' threats to witnesses that caused OTP suspension of the Kenyatta case after a witness admitted giving false evidence "regarding the event at the heart of the Prosecution's case."[1538]

5.9 Conclusion

The level of pressure applied to ICC case selection begs the question as to whether it would accommodate Ugandan preferences to try LRA accused domestically. To do so may only require replacing amnesty with commutation of sentence such that accused spend an ambiguously short time incarcerated, as in Colombia. ICC case selection independence has been systematically broken down since its establishment began during Rome and preparatory negotiations. The normative impetus established after the two world wars was quickly constrained by powerful states' realist interests in retaining the right to wage war. Agenda setting processes ran from 1945 to 1998, in which powerful states' interests in disarming weak states of methods of warfare confronted weak states' interest in deterring powerful states from waging war.

[1536] UN News Centre, "In UN Report, ICC urges Security Council support to enforce decisions," 8 October 2013; eCNA "Investors don't mind Kenya's ICC problems," 16 September 2013; See for example: 'Where Water is Gold' by The Editorial Board, *New York Times*, 19 September 2013; UPI.com, "China Steps into ICC, Kenyan fray," 19 September 2013; Standard Media "France says African Union International Criminal Court plea could be looked into," 16 October 2013.

[1537] China has secured a $2 billion dollar oil concession and holds a contract to build a dam on the Nile. See BBC, China's CNOOC wins $2bn Uganda oil field contract *BBC News*, 26 September 2013; African Globe, Uganda Partners China's Sino-Hydro for $1.6 billion White Nile Dam, African Globe, 21 June 2013.

[1538] *Prosecutor v Uhuru Muigai Kenyatta,* Notification of the removal of a witness from the prosecution's witness list and application for an adjournment of the provisional trial date, 19 December 2013, ICC-01/09-02/11, 3; Wambui Ndonga. "Witness 'attrition' in Kenya cases alarming, says ICC," *Capital FM,* 4 September 2013.

Weak states reconciled abandonment of independent exercise of jurisdiction over aggression by procuring primacy of jurisdiction under complementarity – primacy not afforded by Security Council institutions that powerful states threatened to pursue. Both powerful and weak states managed to coopt norm entrepreneurs by emphasizing the value of encouraging domestic prosecution of international crimes. Failure to communicate the weakness of domestic proceedings required by complementarity undermined ICC case selection independence and the emergence of the norm of international crimes prosecution. The Rome Statute constituted a significant victory in that it expanded the territorial and personal jurisdiction of international criminal justice, particularly via provision of *proprio motu* power to the prosecutor. However, the principle of complementarity constituted a major regression in case selection independence from the ICTR and SCSL. Further, the considerable territorial and personal scope of ICC jurisdiction procured a powerful state effort to capture OTP human agency disproportionate to efforts at the ICTR and SCSL. Western alarm as to the potential sovereignty costs accompanying a norm entrepreneur prosecutor like Carla Del Ponte constituted a critical mobilizer of US, UK and Canadian diplomatic efforts to secure favorable ICC-OTP personnel. That candidate, the personnel that accompanied him, and the constraints on OTP jurisdiction and capacity, constrained ICC case selection independence to the extent it was not able to seriously consider, let alone investigate or apply pressure to, a western ally - the Ugandan government.

The OTP has been constrained further still by the application of functional pressure by weak states seeking to maximize the utility of shaping case selection while ensuring powerful state levers of control do not impinge the interests of weak state governments. To this extent, contestation of case selection control between weak states and powerful states has moved from Statute negotiating in New York and Rome to the arena of functional case selection independence elements. Illustratively, this chapter, by focusing on a particular situation, directs a disproportionately strong lens over a situation of self-referral. Though state-triggered jurisdiction constitutes the majority of situations under investigation, a full examination of ICC case selection independence demands full consideration of situations triggered by Security Council referral and *proprio motu* jurisdiction. While elements of alternative situations were employed to illustrate potential state application of pressure to case selection, a full, contextualized consideration of ICC case selection is beyond the scope of this thesis. I nonetheless reference other ICC situations in my concluding analysis of the trajectory the examined cases suggest for the norm of international crimes prosecution – a norm considered through the framework of case selection independence.

Chapter 6

Conclusion: Case selection independence at the ICTR, SCSL and ICC – A Justice Cascade?

6.1 Indications of a cascading norm?

Measuring a norm's cascade is qualitative and inexact, even within three cases. Sikkink's adjudication of the norm is based on whether, after adoption by enough states, international influence without domestic pressure procures various levels of conformity. I view that framework as inadequate because it does not describe conformity's degree. I have not described 'levels' of conformity, but instead provide a case selection independence framework through which increasing or decreasing conformity may be observed. The framework facilitates identification of normative and realist interests, their contestation in negotiations, and their manifestation in statute provisions and court function. A critical weakness of my framework is its necessarily qualitative nature. I do not ascribe case selection independence elements quantitative values that rank them in terms of their importance. I also abstained from ascribing quantitative value to individual elements in each examined case. The independence of the ICC prosecutor's election, for example, may demand a quantitative rating of high independence. However, heightened realist engagement with that process, diminished process independence. Sikkink cites the rapid dramatic shift in norms' legitimacy, and actions (trials) on their behalf. However, it is the quality of the action, not the quantity that best indicates the norm's cascade or contraction.

In the introduction I acknowledge that my analysis is limited to the examined cases. I have attempted to contextualize each case to the greatest extent possible so as to empirically support my qualitative argument, that the examined cases constitute a 'justice contraction'. Making linear assertions is complicated by the sequential awkwardness of the overlapping cases. However, design and functional trends can be observed by considering key case selection independence elements across cases. The absence of capacity to compel cooperation in domestic courts is common to all three cases, suggesting that in no situation were political actors prepared to relinquish functional control. Perhaps the most significant constraint is that of primacy, an element relinquished only in the case of the ICC. However, ICC design occurred after the ICTR and before the SCSL. An explanation for the absence of primacy at the SCSL may be the weakness of Sierra Leone's government, and the diminished sovereignty cost of an institution designed by allies and disproportionately dependent on government cooperation due to its local location. Conversely, Rwanda voted against the ICTR at the Security Council. While the ICC enjoys broad territorial jurisdiction, triggering investigation of each situation requires negotiation in which the international crimes prosecution norm is weakened. ICTR negotiation compromises still produced jurisdiction over all parties to the conflict, including designing actors that aided and abetted crimes. Similarly, the ICC provides jurisdiction over all parties to the Ugandan conflict. However, ICC jurisdiction is constrained by provision of a complementarity amnesty card to one party to the conflict – the Ugandan government. The SCSL suffers similar constraints of diminished degree in that both parties to the conflict fall under its jurisdiction, but external supporters of the conflict's favored party are excluded. Using jurisdictional elements of case selection independence, we observe a justice contraction across the examined cases. Similarly, a contraction can be observed among functional elements that powerful states demonstrated particular competence in capturing. The most influential functional elements are those relating to personnel and budgetary capacity. These elements, working together, also drive demand for other forms of cooperation. Capacity to procure cooperation does not mean it is fully exhausted. In both elements the ICTR enjoyed greatest independence, with a guaranteed budget and a contested prosecutor's election. The ICC enjoys a similarly secure budget and a similarly independent election process. However, unlike among States Parties, key P5 members, Russia and China, held no interest in a captured ICTR prosecutor. Their demands for ICTR-OTP independence produced Carla Del Ponte – a norm entrepreneur prepared to exhaust state willingness to cooperate. Del Ponte's willingness to assert case selection independence by pursuing cases confronting UK and US interests constituted a moment – the 'Del Ponte moment' – where international criminal justice case selection independence peaked in the examined cases. Confronted with Del Ponte's independence, the US and UK governments not only removed her, but cast far greater diplomatic concentration on ensuring SCSL-OTP and ICC-OTP personnel would not confront their interests. As a consequence, post-Del Ponte case selection independence declined, turning the norm, in the examined cases, into a captured instrument no longer serving its purpose. Del Ponte's attempts to pursue RPF crimes constitute the final genuine attempt to pursue those most responsible for crimes by all parties to a conflict within the examined cases. The demand that explanations focus on court decisions against designing interests by Keohane et al., brings the 'justice contraction' in the examined cases into sharpest focus. Del Ponte's willingness to pursue RPF leaders was followed by SCSL willingness to pursue only those of political expediency to the Sierra Leonean government, which was followed by the ICC's active avoidance of UPDF crimes.

While the 'justice contraction' caused by the 'Del Ponte moment' is concerning, of greater concern for the norm of international crimes prosecution is the Rome Statute's permanent status. Weak and powerful states drew on Sikkink's reliance on quantity of international crimes prosecutions to intertwine the international crimes prosecution norm with the constraining interest of state primacy. As a consequence, realist state actors reduced sovereignty costs via complementarity, which also forms a fig leaf to norm entrepreneurs demanding increased incidents of international crimes prosecution. As complementarity's weakness is illuminated and entrenched by court decisions, a formerly hesitant US government has re-engaged in situations that advance its "interests and policies".[1539] The fact the US still refuses to acknowledge ICC jurisdiction over its nationals may indicate norm entrepreneurs' contribution at the Rome Conference. OTP *proprio motu* discretion, potentially over US nationals, constitutes an element of cascade that continues to focus US concerns and policies on the prosecutor's agency. However, the Rome Statute also constitutes P5 ceding of control over international criminal justice to other governments. US hesitance therefore, also indicates its preference for the increased control it enjoys under the hybrid SCSL model. Contextualizing that cascading element is the US realization of the opportunity to lock the international community, but not itself, into a system it negotiated while the world's sole superpower – one that tolerates aggression but stigmatizes methods of war that harm its interests. Norm entrepreneur states existed at Rome, as they do now. But they constitute the minority, meaning the key international

[1539] Colum Lynch, "War crimes envoy has personal touch," *Washington Post*, 27 November 2009.

justice concessions have been trades in realist interest between powerful and weak states, rather than between states and norm entrepreneurs. One norm entrepreneur involved in both the Rome negotiations and the OTP summarized the likelihood of ICC case selection confronting triggering interests:

"I think that Fatou Bensouda was selected in order not to do that. So I think for the moment, the institution is fully controlled, even more. In 2003, there was still the struggle to control. Now the institution is controlled. And that will not happen. That will simply not happen in the foreseeable future. So, frankly speaking, sometimes I agree with [redacted] when he says the only hope is to scale down the international justice system and to try to develop the national judicial system. Maybe he's right. And I say it with a lot of sadness because really, I work countless hours in order to create this. I did, I had no life but to be involved in that. But at the same time it's good when you're young to put your full energy on something you believe in. It's good, that's part of life, even if ten years later you realize that you have been investing energy in vain. … I guess that now the game is over. And the game is over for a long time."[1540]

6.2 Shifts in Availability of State Levers

Conventional institutional design and state delegation analysis bore greater applicability to the ICTR and SCSL than to a permanent ICC. Investigations into situations before the ICC are not bargained by groups of states, unless the Security Council triggers jurisdiction. Abbott and Snidal cite power differentials among designing actors as instructing the impact of states' and norm entrepreneurs' interests.[1541] While the ICTR and SCSL both

[1540] Interview1, 2012
[1541] Abbott and Snidal 2000.

broadly reflect Security Council power differentials, States, not international institutions, most commonly trigger ICC situations. Delegation of ICC jurisdiction is more likely to occur on the basis of state-to-institution bargaining, where states leverage off the primacy of complementarity to direct investigations against adversaries. The 'game' becomes about developing, with or without external assistance, a state's domestic criminal process so as to exclude sovereignty costs of delegation while retaining political control over domestic proceedings. While the 'game' is becoming one primarily played by weak states more likely the subject of investigations, powerful states also enjoy influence through selective provision of justice sector reform assistance. As signaled in the previous chapter, regional bodies like the AU, potentially wielding their own complementarity-compliant processes, may act as intermediaries or weak state supporters.

Similarly, regional bodies and powerful states may instrumentalize their own interpretations of states' domestic proceedings by implicitly threatening to trigger ICC jurisdiction. US government comments in June 2010 hint at that strategy's application to Sri Lanka.[1542] To this end understanding the data available to states to make accusations becomes increasingly important. For states seeking to pre-empt or shape norm entrepreneurs' approach, understanding available information also constitutes a strategic advantage over weak states. Reports that US and UK intelligence agencies are spying on NGOs suggests those states already realize that advantage.[1543]

[1542] TamilNet, Top US war-crimes official visits Sri Lanka, *Tamilnet*, 06 January 2014.

[1543] James Ball and Nick Hopkins, "GCHQ and NSA targeted charities, Germans, Israeli PM and EU chief," *The Guardian*, 20 December 2013.

While powerful states enjoy the advantages of employing more sophisticated measures, the ICC endows weak states and norm entrepreneurs with power to trigger investigations, or prompt OTP triggering of investigations. This power has already been deployed by a group of Egyptian lawyers against Barack Obama, by a Canadian national against his own government, by the Comoros Islands against Israel, and by the Muslim Brotherhood against the Egyptian government.[1544] As already emphasized, a key emerging weak state lever is increased scope for complementarity-empowered forum shopping, particularly as regional organizations consider availing courts to member states.[1545]

6.3 The Global Economic Order and International Justice

The availability of state levers to affect case selection is also instructed by a shifting global economic order. The examined cases suggest weak states are benefitting from increased competition amongst powerful states in two ways. Firstly the Security Council is becoming less active on issues of international justice. Post-Cold War US predominance at the Security Council is increasingly challenged where confronting Russian or Chinese interests, particularly when eastern P5 members act together. For example, in Syria, analogous interests are at hand to those of the 1993 establishment of the ICTY in the former Yugoslavia. Russia, with Chinese support, has blocked Security Council statements and resolutions condemning abuses in Syria and is unlikely to allow an ICC referral.[1546]

[1544] Patrick Howley, "Obama accused of crimes against humanity in international court," *The Daily Caller*, 9 November 2013; *MWCNews*, "International Court asked to investigate alleged war crimes, Canada," *Media with Conscience News*, 10 November 2013; Dan Kedney, "Egypt's Muslim Brotherhood Takes Struggle to ICC," *Time Magazine*, 7 January 2014; *AP/Times of Israel*, "ICC opens initial probe against Israel over Marmara raid," *The Times of Israel*, 14 May 2013.

[1545] Elizabeth Dickinson, "Bahrain selected as HQ of Arab Court for Human Rights," *The National,* 3 September 2013; Xinhua, "Ecuador proposes creation of regional criminal court," *Global Times,* 19 November 2013.

[1546] HRW, *UN Security Council: Seize Chance for Justice in Syria*, 17 September 2013.

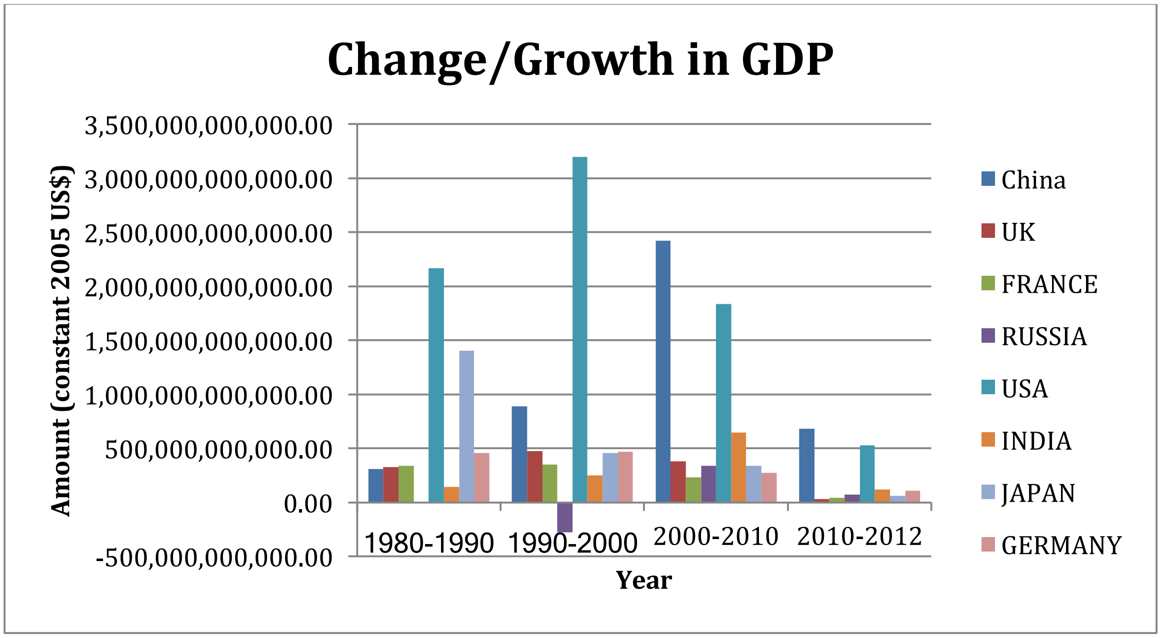
China has taken a similar position on Myanmar.[1547] Myanmar and Syria constitute states of significant Chinese and Russian interest. Though China is Sudan's primary economic patron, it declined to veto ICC referral of Sudan, suggesting China may seek to maintain prestige where its interests are insufficiently significant or threatened.[1548]

Complementarity, as already discussed, makes *proprio motu* assertion of jurisdiction less probable. A less active Security Council leaves the OTP more dependent on State referrals as a trigger of jurisdiction – further empowering weak states' bargaining positions with the OTP.

Weak states' negotiating position also benefits from a shifting global economic order via increased options for economic patronage. That competition diminishes international crimes-related pressure from powerful states and international justice's compliance pull. China recently made a statement in support of the AU's pro-Kenya ICC position and recently commenced increased security cooperation to accompany its significant economic engagement.[1549] The dramatic shift from US-driven global growth in the 1990s, to China-driven growth over the last decade is illuminated, along with Russia's post-cold war collapse in Figure 3 below.[1550]

[1547] Stewart Manley, "Gauging the Economic and Political Costs to China of Article 13(b) Referrals of Sudan and Myanmar to the International Criminal Court," *East Asia Law Review* 7(2) (2013), 333-396.
[1548] Ibid.
[1549] Statement by Mr. Ma Xinmin, The Hague, November 2013; Simon Ndonga, "Kenya, China pact to secure borders, waters," *Capital News*, 3 January 2014.
[1550] Knoema.com, World Development Indicators (WDI) & Global Development Finance, Source: The World Bank.

Figure 3: Contribution to global growth by state



6.4 Explaining Case Selection Independence

Regulatory change, according to Mattli and Woods, requires communication of deficiencies to negatively affected constituencies alongside entrepreneur collaboration with committed allies.[1551] Norm entrepreneurs failed to grasp the implications of Rome Statute provisions and failed to communicate them sufficiently to negatively affected constituencies – those outside strong and weak state governments. Strong and weak states shared a realist interest in capturing international criminal justice case selection but also retained an interest in deploying it against one another. Weak states, in a compromise with strong states captured norm entrepreneurs through compromises those entrepreneurs still endorse despite their clear manifestation in opposition to case selection independence. Norm entrepreneurs had managed to engage and mobilize around the fact that 'an'

[1551] Mattli and Woods 2009.

international criminal court had been mooted. As that mobilization grew, P5 states attempted to set the agenda by establishing courts that advanced their interests – courts who's potential replication they then used as leverage to extract weak state concessions on the crime of aggression. Realist state interests emphasized liberalist civil society power to cause state action against realist interests in order to procure support for the realist gain of complementarity. Emphasizing the normative power of domestic prosecutions also lent emphasis to the role of norm entrepreneurs.

The extent to which norm entrepreneurs have been captured in international criminal justice is best demonstrated by an assessment of the state of international crimes prosecution in a recent special edition of the Journal of International Criminal Justice. While the contributors bemoan the decline of international criminal justice alongside domestic exercise of universal jurisdiction, their analysis is largely descriptive. Akhavan, who does not even mention universal jurisdiction, lauds Rome Statute 'empowering' of national jurisdictions, citing success as an idle ICC.[1552] Akhavan argues that if we accept constrained case selection independence now, independence will expand incrementally within the international criminal justice system.[1553] He omits to say how space could be opened up without significant Rome Statute revision or abandonment. Luban and Orentlicher similarly cite complementarity as an achievement, but nominate incidents of contraction in both universal jurisdiction and international criminal justice.[1554] Delmas-

[1552] Payam Akhavan, "The Rise, and Fall, and Rise of International Criminal Justice*," J Int Criminal Justice* 11 (3) (2013), 527-536.
[1553] Ibid.
[1554] David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice," *J Int Criminal Justice* 11 (3) (2013), 505-515; Diane Orentlicher, "Owning Justice and Reckoning with its Complexity," *J Int Criminal Justice* 11 (3) (2013), 517-526.

Marty does identify complementarity and generic or caveated Rome Statute provisions as sovereignty orientations. However, she wrongly attributes non-prosecution of economic actors to ICC jurisdiction, neglecting aiding and abetting and OTP resource constraints.[1555] More importantly, the attempted explanations the special edition provides do not, through any framework, trace functional impediments to courts' statute provisions, and the contestation of realist and normative interests that produced them. Of the special edition's authors, Schabas comes closest to providing an explanation. He identifies willingness to confront designing interests by citing willingness to prosecute the powerful as a measure of normative advance.[1556] Further, he rightly identifies international criminal justice's cyclical nature. He observes the shift in African states' position from one of court supporter, to that of opponent. He also identifies the US policy shift from opponent to cautious supporter. However, his characterizations of African states' initial support lend them norm entrepreneur status rather than self interested actors attempting to extinguish Security Council discretion to impose jurisdiction. Further, characterization of AU policy towards the court as broadly in opposition ignores the benefits of state referral the AU seeks to maintain, as indicated by its reluctance to abandon the court as Kenya requested. Where the empirical data in the examined cases completely supports Schabas, is in his characterization of gradual US endearment by a court sufficiently captured to refrain from breaching US interests, and in his indication of weak state contestation of Security Council discretion to trigger and defer jurisdiction.[1557] His observations of AU hostility towards Security Council intervention reinforce AU enthusiasm for ICC function at the behest of

[1555] Mireille Delmas-Marty, "Ambiguities and Lacunae: The ICC Ten Years On," *J Int Criminal Justice* 11 (3) (2013), 553-561.
[1556] William Schabas, "The Banality of International Justice," *J Int Criminal Justice* 11 (3) (2013), 545-551.
[1557] Ibid.

state referral. Kahler's observations that governments choose legalized institutions where the benefits of collective action and cooperation outweigh sovereignty and other costs of legalization best reflect the US position.[1558] While the US has not delegated to the Rome Statute, it is gradually accepting its existence in that it binds others to a system of regulation that advances its interests while almost completely removing sovereignty costs through functional capture and complementarity. US confidence endorses the view of Goldstein et al. that it is the functional, rather than the jurisdictional constraints that are most instructive for understanding institutional independence.[1559]

Schabas' citation of a disaffected civil society threatening the court confronts the Mattli and Woods' thesis that criticism might drive Rome Statute reform or mobilization behind greater case selection independence in alternative fora. This sensitive handling of norm entrepreneurs enables their poor performance in communicating system deficiencies. That performance drives international justice inadequacies including regulatory capture by realist state interests. That capture is further enabled by the 'more is better' approach of Sikkink to norm cascade. The embrace of complementarity threatens to further diminish norm entrepreneurs' normative impact as domestic justice sector reform opportunities divert capacity from communicating system failures to negatively affected constituencies.

The cases I examine demonstrate the power of hegemonic stability, where victor's justice can be pursued when a hegemon is able and willing to assert itself. In Rwanda, an Anglo-American-employed ICTR supported a client regime as it did in Sierra Leone alongside a

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[1558] Kahler 2000, 661-683, 662.
[1559] Goldstein et al., 2000.

strategy of Liberian regime change. In Uganda, a US-conscious and nascent ICC-OTP, captured from within by Anglophone agency, demonstrated the power of a unipolar global order. The design and function of these courts occurred during circumstances of unquestioned US economic and military predominance, but also under increasing capacity for norm entrepreneur mobilization in an internet-era accompanying globalization. As the rate of globalization slows, according to Abbott and Snidal, so to will the hardening of legalization, suggesting hegemonic stability was assisted in driving an advance in international crimes case selection.[1560] Schabas cites potential for a cyclical international justice downturn after an active decade following the ICTY's establishment. That analysis fits my argument in the previous section that readjustment of international crimes case selection independence appears, according to the examined cases, to mirror shifts in the global economic order. That shift is also a natural manifestation of the compromise of weak state and powerful state realist interests that captured ICC design. That compromise, along with the shifting global order, diminishes powerful states capacity to employ justice instruments while increasing that capacity for weak state governments. Consensus is emerging among weak and powerful states that the Rome Statute advances their interests. That consensus causes, as Epstein and O'Halloran note, diminished independence, unlike the East-West disagreement that produced a norm entrepreneur ICTR prosecutor.[1561] Employing a case selection independence framework, itself in nascent form, assists interpretations of the degree to which weak and powerful states, as well as norm entrepreneurs are seizing control of international crimes prosecution in the examined cases.

[1560] Abbott and Snidal 2000, 421–456, 456.
[1561] Epstein and O'Halloran 1999.

6.5 Scope for Further Research

The finding of a 'justice contraction' in the examined cases has serious implications for international criminal justice. The first question scholars may wish to consider is whether a 'justice contraction' is occurring throughout the international criminal justice system? Answering that question requires consideration of the entire system, including all the situations under OTP investigation or preliminary examination. The finding of a shift in power to trigger international justice may have consequences for armed conflict. Institutionalization of international crimes 'locks-in' historical narratives and state policy.[1562] Scholars may wish to consider the impact of increasing weak state access to that instrument.

Communications of evidence to the OTP in the hope of triggering *proprio motu* jurisdiction constitute an available course of action to norm entrepreneurs attaching variant levels of stigma and consequence to those implicated. However, the ease with which states may trigger complementarity renders the chance of consequent *proprio motu* action remote. The remoteness of norm entrepreneur-initiated investigations may cause scholars to consider other processes. Cases examined in this thesis illuminate the weakness of domestic processes' case selection independence. However extra-territorial domestic exercise of universal jurisdiction is very different. Scholars have observed that universal jurisdiction's scope exceeds that of international criminal justice. Senior US officials have refrained from travelling to Europe after a German prosecutor indicted Donald Rumsfeld

[1562] David 1994.

for torture and Swiss torture victims initiated proceedings against George W. Bush.[1563] While the processes have since ceased, scholars may consider the comparative impact on impunity, including through a case selection independence framework. That issue was raised by comments from a former OTP officer that also worked to establish the ICC: "International criminal justice is used in order to calm down the willingness of some states to go too far in universal criminal jurisdiction, and I say that institutions like the ICC were used very effectively to calm down the willingness to improve universal criminal jurisdiction."[1564]

If universal jurisdiction enjoys greater case selection independence than international criminal justice, thereby posing a greater threat to impunity, scholars may consider whether the two forums complement one another or compete – does international criminal justice impede proliferation of universal jurisdiction? Scholars may explore whether norm entrepreneur capacity has been captured through disproportionate direction towards scarce scope for case selection independence gains in international criminal justice. Exploration of that question may require consideration of norm entrepreneurs' demands for Security Council referral comparative to efforts directed at triggering universal jurisdiction in cases such as Syria's ongoing conflict. An accompanying avenue for further study is whether international criminal justice has dampened or energized domestic efforts to establish extra-territorial jurisdiction over international crimes – has international justice mobilized public pressure to establish universal jurisdiction regimes, or has it diminished that pressure because international institutions are viewed as the appropriate forum for

[1563] Chris Mahony, "Victor's Justice: What's wrong with warlord Charles Taylor's conviction," *The Atlantic*, 30 April 2012.
[1564] Interview1, 2012.

international crimes prosecution? Whether the norm of international crimes prosecution is better off with or without the existence of international criminal justice may be the most important avenue for future scholarly inquiry.

Another question scholars may explore is the behavior the current international criminal justice system accommodates. Scholars may consider what might have been, were weak states more assertive about procuring some semblance of case selection independence over the crime of aggression. Might we frame differently Saudi, Qatari and US support for elements fighting the Syrian government? What trends exist in the relationship between capacities to trigger international criminal justice investigation, sanctions, the responsibility to protect and the likelihood of internal instability escalating into civil or international armed conflict? A realist explanation of absent criminal consequence for aggression accompanied by a controlled norm of criminal culpability for violations of international humanitarian law, suggests powerful states can escalate conflict, procuring criminality that justifies intervention – an instrument of great utility when seeking to encroach upon adversaries' respective spheres of influence.

Appendix I: Tables and Graphs

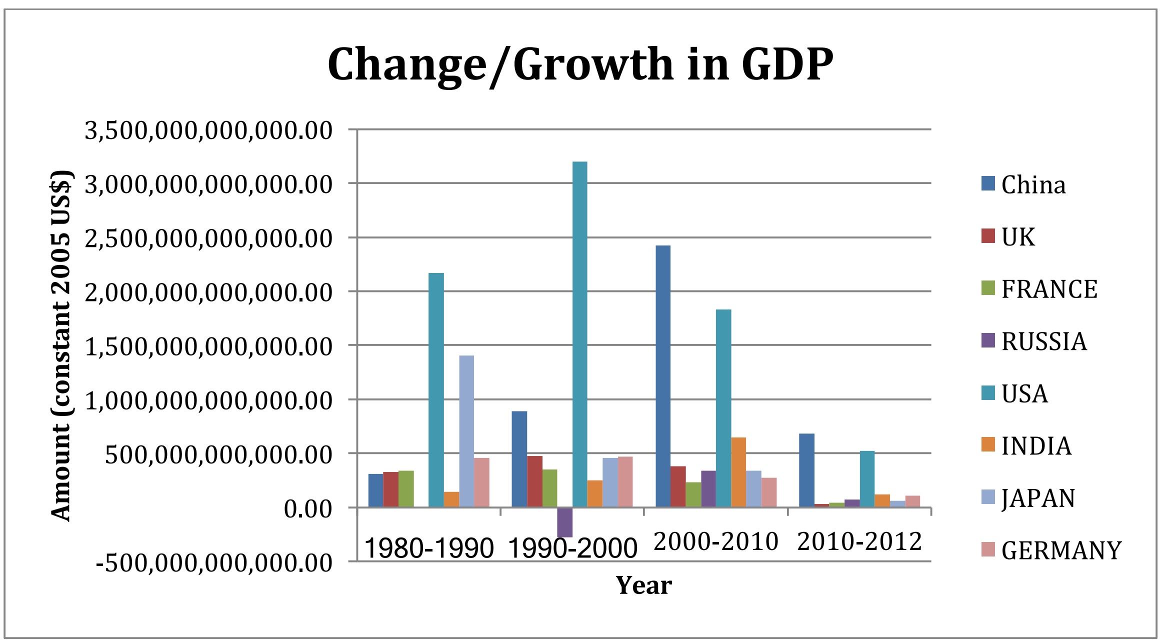
Figure 1: Military allegiance in Sierra Leone's conflict at May 1997

France (US, peripherally)	UK
SLA	
RUF	CDF
APC	SLPP

Figure 2: Military allegiance in Sierra Leone's conflict at May 2000

France (an increasingly cautious US)	UK
APC	SLPP
RUF	CDF
	SLA
	ECOMOG

Figure 3: Contribution to global growth by state



The data informing this graph was obtained from:
Knoema.com, World Development Indicators (WDI) & Global Development Finance, Source: The World Bank. Available at: http://knoema.com/WBWDIGDF2013Oct/world-development-indicators-wdi-global-development-finance-gdf-october-2013, accessed at December 3 2013.

Interviews

N°	Anonymous Title
1.	Former Rome Conference Delegate and ICC-OTP member, 4 December 2012, The Hague, The Netherlands, interview n°1
2.	Former Advisor, US Mission to the UN, 28 October 2012, Auckland, New Zealand, interview n°2
3.	Kawusu Kebey, Former Chief, Development and Aid Coordination Office, Freetown, Sierra Leone, 30 March, 2007, interview n°3
4.	Glenna Thompson, Former Director of Prosecutions, Sierra Leone Anti-Corruption Commission, 22 April 2008, Freetown, Sierra Leone, interview n°4
5.	Smokin Wanjala, Member of the Kenyan Anti-Corruption Commission, 4th April 2008, Nairobi, Kenya, interview n°5
6.	Former Member, Criminal Investigations Department, Sierra Leonean Police, 20 May 2008, Freetown, Sierra Leone, interview n°6
7.	Hassan Omar Hassan, Former Commissioner, Kenyan National Human Rights Commission, 27 April 2009, Nairobi, Kenya, interview n°7
8.	Jack Christophides, Africa Director, United Nations Department of Peacekeeping Operations, 3 November 2012, New York, USA, interview n°8
9.	Mohammed Taziff Koroma, Academic, Fourah Bay College and former Co-author SLTRC Commission report, 5 April 2007, Freetown, Sierra Leone, interview n°9
10.	Nicole Zarifis, Justice Law and Order Sector Advisor Foreign Advisor, 18 November 2012, Kampla, Uganda, interview n°10
11.	Former Tunisian delegate to the UN Security Council, 11 June 2009, The Hague, the Netherlands, interview n°11
12.	Saleem Vahidy, Former Chief, Witness and Victims Section, Special Court for Sierra Leone, 28 March 2007, Freetown, Sierra Leone, interview n°12
13.	Johnson Okello, Commissioner, Kenya Law Reform Commission, 3 April 2008, Nairobi, Kenya, interview n°13
14.	Lynette Keogh, Program Manager, Justice Sector Development Programme, 6 March 2008, Freetown, Sierra Leone, interview n°14
15.	Michael Matheson, Former Principal Deputy Legal Adviser to US Ambassador to the UN, 1990-2000, 8 January 2013, via telephone, interview n°15
16.	Herman von Hebel, Former Registrar, Special Court for Sierra Leone, 2 April 2007, Freetown, Sierra Leone, interview n°16
17.	Former State Department Officer, 20 November 2012, via phone, interview n°17

18.	Tadeo Asiimwe, Registrar, International Crimes Division, Kampala, Uganda, 17 November 2012, interview n°18
19.	Desmond de Silva, Former Chief and Deputy Prosecutor, Office of the Prosecutor, Special Court for Sierra Leone, 16 April 2007, London, United Kingdom, interview n°19
20.	Lansana Gberie, Academic, 15 December 2011, New York, USA, interview n°20
21.	Moses Adriko, Chairperson, Advocates for Public International law, 9 April 2008, Kampala, Uganda, interview n°21
22.	David Crane, Former Chief Prosecutor, Special Court for Sierra Leone, 17 May 2007 and 17 August 2010, via telephone, interview n°22
23.	Former United States Government official (informal conversation), Oxford, United Kingdom, 31 May 2010, interview n°23
24.	Serry Kemal, Former Attorney General and Minister of Justice, 21 May 2008, Freetown, Sierra Leone, interview n°24
25.	Karim Khan, Defence Counsel, International Criminal Court, 9 June 2009, The Hague, The Netherlands, interview n°25
26.	Nicholas Rostow, Former Senior Policy Adviser to the U.S. Permanent Representative to the United Nations and General Counsel, U.S. Mission to the United Nations, 9 November 2012, Washington DC, USA, interview n°26.
27.	Simo Vaatainen, Former Chief, Victims and Witnesses Unit, International Criminal Court, 11 June 2009, The Hague, The Netherlands, interview n°27
28.	Civil Society Activist, 9 April 2008, Kampala, Uganda, interview n°28
29.	Ugandan Official, 1st December 2012, The Hague, The Netherlands, interview n°29
30.	Olayinka Creighton-Randall, Former Director, Campaign for Good Governance, 3 April 2007, Freetown, Sierra Leone, interview n°30
31.	James Lyons, Former ICTR investigator, 4 October 2013, via telephone, interview n°31
32.	Tom Kagwe, Deputy Executive Director, Kenyan Human Rights Commission, 28 April 2009, Nairobi, Kenya, interview n°32
33.	Abdul-Tejan Cole, Former Sierra Leone Anti Corruption Commissioner, 22 April 2008, Freetown, Sierra Leone, interview n°33
34.	Former US Department of State Official, 8 November 2012, Washington, USA, interview n°34
35.	Former Office of the Prosecutor, Special Court for Sierra Leone official, 3 April 2007 and 3 February 2013, Freetown, Sierra Leone, interview n°35

36.	James Penywii, Director of Operations, Inspectorate of Government, 21 April 2009, Kampala, Uganda, interview n°36
37.	Member of the United States Mission to the United Nations, 2 November 2012, New York, USA, interview n°37
38.	George Wachira, Director, Nairobi Peace Initiative, 3 April 2008, Nairobi, Kenya, interview n°38
39.	Peter Anderson, Former Chief of Public Relations at the Special Court for Sierra Leone, 29 March 2007, Freetown, Sierra Leone, interview n°39
40.	Adam Branch, Academic, Makere University, 14 November 2012, Kampala, Uganda, interview n°40
41.	United States Embassy Officer, 16 November 2012, Kampala, Uganda, interview n°41
42.	Robin Vincent, Former Registrar, Special Court for Sierra Leone, 19 April 2007, Cheltenham, United Kingdom, interview n°42
43.	Sirku Hellsten, Counselor, Finland Embassy, 29 April 2009, Nairobi, Kenya, interview n°43
44.	Former staffer to Senator Judd Gregg, United States Senate, 13 December 2010, via telephone, interview n°44
45.	Vincent Bablando, Foundation for Human Rights Initiative, 7 April 2008, Kampala, Uganda, interview n°45
46.	Pascal Turlan, Judicial Cooperation Adviser, Office of the Prosecutor, International Criminal Court, 5 December 2012, The Hague, The Netherlands, interview n°46
47.	Member of the US Department of State, 6 November 2012, Washington D.C, USA, interview n°47
48.	Alice Ondieki, Director, Kenyan Witness Protection Agency, 30 April 2009, Nairobi, Kenya, interview n°48
49.	Katja Kerschbaumer, Advisor, Justice Law and Order Sector, 20 November 2012, Kampala, Uganda, interview n°49
50.	Victoria Holt, Former staffer to US Ambassador to the UN, Richard Holbrooke, 13 January 2011, via Skype, interview n°50
51.	Valnora Edwin, Director, Campaign for Good Governance, 28 March, 2007, Freetown, Sierra Leone, interview n°51
52.	Cecilia Balteanu, Head of Field Strategic Coordination and Planning Unit, Registry, International Criminal Court, 5 December 2012, The Hague, The Netherlands, interview n°52
53.	Joanne Kagezi, Prosecutor, International Crimes Division, High Court of Uganda,

	19 November 2012, Kampala, Uganda, interview n°53
54.	Michael Miklaucic, Former Deputy Ambassador at Large for War Crimes Issues, U.S. Department of State, 20 September 2011, via telephone, interview n°54
55.	Former member, Office of the Prosecutor at the Special Court for Sierra Leone, 18 May 2007, via telephone, interview n°55
56.	Keriako Tobiko, Director of Public Prosecutions, 28 April 2009, Nairobi, Kenya, interview n°56
57.	Beatrice Le Fraper du Hellen, Former Head of Jurisdiction, Complementarity and Cooperation, Office of the Prosecutor, International Criminal Court, 8 June 2009, The Hague, The Netherlands, interview n°57
58.	Nsaba Buturo, Former Minister of State for Ethics and Integrity, 23 April 2009, Kampala, Uganda, interview n°58
59.	Harpinder Collacott, Former Prosecutor, Special Court for Sierra Leone, 20 March 2007, via telephone, interview n° 59
60.	Bankole Thompson, Former Appeals Chamber Judge, Special Court for Sierra Leone, 30 March 2007, Freetown Sierra Leone, interview n°60
61.	Former Tunisian delegate to the UN Security Council, 11 June 2009, The Hague, The Netherlands, interview n°61
62.	Lyandro Komakech, Refugee Law Project, 16 November 2012, Kampala, Uganda, interview n°62
63.	Francis Munu, Assistant Inspector General of Police for Crime Services, Sierra Leone Police, 16 May 2008, Freetown, Sierra Leone, interview n°63
64.	Michael Hourigan, Former investigator, International Criminal Tribunal for Rwanda, 20 September 2013, via telephone, interview n°64
65.	Peter Tucker, Sierra Leone Law Reform Commissioner, 5 April 2007, Freetown, Sierra Leone, interview n°65
66.	Michel De Smedt, Chief of Investigations, Office of the Prosecutor, International Criminal Court, 8 June 2009, The Hague, The Netherlands, interview n°66
67.	Tom Bifwoli, Former Legal Counsel to the Attorney-General, 4 April 2008, Nairobi, Kenya, interview n°67
68.	Mukatan Rugyendo, Publication Editor, Uganda Debt Network, 8th April 2008 and 21 April 2009, Kampala, Uganda, interview n°68
69.	Michael Miklaucic, Former Deputy Ambassador at Large for War Crimes Issues, U.S. Department of State, 20 September 2011, via telephone, interview n°69
70.	Investigator, International Criminal Court, Saturday 1 December 2012, Washington D.C., USA, interview n°70
71.	Former Prosecution Investigator for the Special Court for Sierra Leone, 26 August 2010, via telephone, interview n°71
72.	Binta Mansaray, Former Outreach Coordinator, Special Court for Sierra Leone, 30

	March, 2007, Freetown, Sierra Leone interview n°72
73.	Kevin Linskey, Former staffer to Senator Judd Gregg, 13 December 2010, Washington D.C., USA, interview n°73
74.	Alhaji Ibrahim Ben Kargbo, President, Sierra Leone Association of Journalists, 4 April 2007, Freetown, Sierra Leone, interview n°74
75.	Tabitha Netuwa, Protection Officer, east and horn of Africa Human Rights Defenders Network, 23 April 2009, Kampala, Uganda, interview n° 75
76.	Member of the Office of the Prosecutor, International Criminal Court, 3 December 2012, The Hague, The Netherlands, interview n°76
77.	Gavin Simpson, Author, Military and Political History chapter, SLTRC report, 30 March 2007, Freetown, Sierra Leone, interview n°77
78.	Zach Kaufman, Academic, George Washington University, 10 November 2012, Washington, USA, interview n°78
79.	Shem Byakagaba, Deputy Registrar, Judicial Commission, 22 April 2009, Kampala, Uganda, interview n°79
80.	Former member of the Office of the Prosecutor, International Criminal Court, 28 November 2012, Palo Alto, US, interview n°80
81.	Phil Clark, Academic, London, 11 December 2012, London, United Kingdom, interview n°81
82.	Former staffer to Senator Judd Gregg, 12 July 2012, Washington D.C., USA , interview n°82
83.	Sulaiman Jabati, Coordinator, Coalition for Justice and Accountability, 29 March, 2007, Freetown, Sierra Leone, interview n°83
84.	Vincent Nmehielle, Former Principal Defender, Special Court for Sierra Leone, 2 April 2007, Freetown, Sierra Leone, interview n°84
85.	Jonathan Moses, Former Prosecutor, International Criminal Tribunal for Rwanda, 23 May 2012, Auckland, New Zealand, interview n°85
86.	Former member, Office of the Prosecutor at the Special Court for Sierra Leone, 18 May 2007, via telephone, interview n°86
87.	Gerhard van Rooyen and Stefan Liller, UNODC advisors to the Kenyan government, 26 April 2009, Nairobi, Kenya, interview 87
88.	Jasper Tumuhimbise, Coordinator, Anti-Corruption Coalition, 8th April 2008, Kampala, Uganda, interview n°88
89.	Livingston Sewanyna, Foundation for Human Rights Initiative, 21 April 2009, Kampala, Uganda, interview n°89
90.	Duncan Laki Muhumuza, Member of the Ugandan Mission to the United Nations, 5 November 2012, New York, USA, interview n° 90
91.	Colin Keating, Former New Zealand Ambassador to the UN, 29 September 2011, via phone, interview n°91

92.	Priscilla Nyokani, Kanyu Kenya Project Officer, International Commission of Jurists, 4 and 7 April 2008, Nairobi, Kenya, and Kampala, Uganda, interview n°92
93.	Former Member, Ugandan National Security Council, 19 November 2012, Kampala, Uganda, interview n°93
94.	Michael Ronning, USAID, 16 November 2012, Kampala, Uganda, interview n°94
95.	Chris O'Brien, Former Deputy Chief, Victims and Witnesses Unit, International Criminal Court, 10 June 2009, The Hague, The Netherlands, interview n°95
96.	Paul Seils, Former Head of Situation Analysis, ICC-OTP, 16 December 2011, New York, USA, interview n°96.
97.	Andrea Rocca, Frontline Defenders, 21 April 2009, Kampala, Uganda, interview n°97
98.	L. J. Chinery – Kesse, Legislative Drafting Advisor, Ministry of Justice and Constitutional Affairs, 8 April 2008, Kampala, Uganda, interview n°98
99.	Stefan Barriga, Liechtenstein Deputy Ambassador to the UN, 6 November 2012, New York, USA, interview n°99
100.	Djordje Djordjevic, Rule of Law Advisor, 1 November 2012, New York, USA, interview n°100
101.	Edward Ochom, Director, Criminal Investigations, Assistant inspector General of the Ugandan Police, 24 April 2009, Kampala, Uganda, interview n°101
102.	Sideke Dabo, Mining supervisor, 29 March, 2007, Freetown, Sierra Leone, interview n°102
103.	Richard Goldstone, Former Chief Prosecutor, International Criminal Tribunal for Rwanda, 20 May 2013, Florence, Italy, interview 103
104.	Paul Ronan, Director of Policy, Resolve, 9 November 2012, Washington, D.C., USA, interview n°104
105.	Roger Clark, Former Diplomat at Rome Conference, 14 October 2013, via telephone, interview n°105.
106.	Matthew Brubacher, Former Analyst, Jurisdiction. Complementarity and Cooperation Division, ICC-OTP, 15 July 2013, via telephone, interview n°106.
107.	Gavin Hood, Former Senior Policy Advisor to the Chief Prosecutor, ICC-OTP, 24 May 2013, via telephone., interview n°107.
108.	Celia Balteanu, Head of Field Strategic Coordination and Planning Unit, ICC-Registry, 4 December 2012, The Hague, interview n°108.
109.	Justice Dan Kiiza, Member International Crimes Division, High Court of Uganda, 15 November 2012, Kampala, interview n°109

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